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Law as an Instrument of Educational Policy-Making

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INTRODUCTION

A. The Comparative Perspective

American educators hold to the belief that they are especially vulnerable to the legalization of myriad policy questions. They see courts deciding issues—concerning school finance, for instance, or the treatment of limited-English-speaking students—that were previously left to professional discretion, bureaucratic norms, or political judgment. They observe law-like forms being introduced into the schools, as with the treatment of the handicapped and the discipline of disobedient students. In the educators' view, the language of rights, rules and reasons—the language of the law—has become newly dominant, their professional authority correspondingly diminished.[1]

This set of perceptions, although true enough, is too parochial. For one thing, it too sharply distinguishes education from other governmental activities. Legalization is one of the modern master trends of governance, a means of harnessing the great power exercised by the twentieth century welfare state.[2] Legalization inheres in the conception of negative liberty, the right of individuals to be free from governmental imposition, an idea given invigorated meaning with expansive readings of constitutional bills of rights. It also powers the greatly enlarged conception of positive liberty, claims on

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1. See generally Kirp (ed.), *School Days, Rule Days: The Regulation and Legalization of American Education* (1984) [hereinafter cited as *School Days*].

2. See e.g., Nonet & Selznick, *Law and Society in Transition: Toward Responsive Law* (1978); Ehrmann, *Comparative Legal Cultures* (1976).

the state for support in the effective exercise of one's rights.[3] In the broad domain of social welfare, the notion of government aid as a privilege, awarded on whatever terms government chooses, has been supplanted by a recognition that beneficiaries have certain rights against the state. The recipient of welfare or food stamps or social security has a legally enforceable entitlement;[4] the patient in a mental hospital makes a claim for treatment, not mere incarceration;[5] even the treatment of prisoners is increasingly circumscribed by legal norms.[6] Moreover, legalization serves to make administrative officials formally accountable for their decisions by obliging them to rely on rules to justify their actions; in this respect it acts as a counterweight to bureaucratic aggrandizement. The vulnerability of education to legalization thus reflects not only the interest of the stakeholders in liberty, in both its negative, choice-enhancing dimension and its positive, equalitarian dimension, but also the concern for bureaucratic accountability. It exemplifies a more general tendency to rely on the norms and forms of law to secure basic social goods and to protect individual autonomy.

A fixation with legalization of American education is parochial in a second sense, for it takes no account of the comparative dimension of the phenomenon. Law-like rules beget rules in all parts of the globe; of greater interest, the idea of rights enforceable against the state is a commonplace of western democracies.[7] The pace of rights development in particular policy areas will vary: for example, the most fully legalized system in Britain governs industrial relations, while the rights of prisoners and the mentally ill have been given particular specification in West Germany. Legalization in education has thus far achieved its fullest flowering in the United States,[8] but it is also of considerable significance in other countries. Indeed, decisions that in America would clearly be regarded as outside the province of the courts are elsewhere subject to legal control. In West Germany, for instance, judges closely scrutinize the capacity of the universities, protecting the constitutional right of qualified students to pursue their chosen courses of study, even to the extent of measuring the physical space available to a faculty of

3. The concepts of negative and positive liberty are developed by Isaiah Berlin in *Four Essays on Liberty* (1969).

4. See e.g., Goldberg v. Kelly, 397 U.S. 254 (1970). For early discussions of welfare rights, see Reich, "The New Property," 73 *Yale L.J.* 733 (1964); Piven & Cloward, *Regulating the Poor* (1971). The cases are collected in Tribe, *American Constitutional Law* (1978).

5. See e.g., O'Connor v. Donaldson, 422 U.S. 563 (1975).

6. See, e.g., Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982).

7. See generally Cappelletti & Cohen, *Comparative Constitutional Law* (1979).

8. See generally Yudof, Kirp, van Geel, & Levin, *Educational Policy and the Law* (1982) [hereinafter cited as *Educational Policy and the Law*].

dentistry to determine if additional students might not be accommodated in the program.[9]

Why might legalization assume the various forms that it has taken in western democracies? And what does this development portend for the formation of education policy in such countries? The answers usually proffered by social theorists fail to satisfy. If the American educator who bemoans a loss of personal autonomy holds a too narrow view of the matter, the theorists reach too far in their quest for universal explanations. To critics on the Left, legalization in education is only a manifestation of a larger crisis of legitimacy in capitalist societies: the forms of law compensate for the lack of legitimation in the political systems. Seen this way, legalization is a transient and ultimately futile strategy, a way-station on the road to a wholly different set of relationships between government and governed.[10] Centrist critics, more attentive to integrative than to disintegrative forces, treat legalization as a device to rationalize an increasingly complex and differentiated social system.[11]

These competing conceptions fail to capture the important variations among nations, both in the degree of legalization and in the determination of which issues are deemed fit for legalized resolution. This essay draws on the experiences of the United States, Britain, West Germany, and Israel, four nations with highly developed public educational systems in which the law has been relied upon for markedly different purposes, with widely varying degrees of significance.[12] It focuses on the use of law as an instrument for resolving educational policy disputes in each of those countries, searching for explanations of the perceived variations.

B. The Appeal of Legalization

Legalization competes with other modes of conceptualizing and resolving policy issues.[13] A given question may alternatively be regarded as best settled by recourse to professional judgment, and in

9. On judicial policing of the *numerus clausus*, see Merritt, "The Courts, the University and the Right of Admission in the Federal German Republic," 17 *Minerva* 1 (1979); Cole, "Federalism and Universities in West Germany: Recent Trends," 21 *Am. J. Comp. L.* 45 (1973); Spence, "Access to Higher Education in the Federal Republic of Germany: The *Numerus Clausus* Issue," 17 *Comp. Educ.* 3 (1981).

10. See, e.g., Habermass, *Legitimation Crisis* (1975).

11. See, e.g., Inkeles, "The Emerging Social Structure of the World," 27 *World Politics* (1975). See generally, Crozier, Huntington, & Watearki, *The Crisis of Democracy* (1975); Cappelletti, *Judicial Review in the Contemporary World* (1971).

12. The discussions of Britain, West Germany, and Israel draw on material gathered in interviews with judges, educational administrators, academics, journalists, and on unpublished file material, as well as on published sources.

13. See Kirp, "Professionalization as a Policy Choice: British Special Education in Comparative Perspective," 34 *World Politics* 137 (1982), for a development of these alternative conceptualizations.

that event, expert say prevails. The question might on the other hand be seen as apt for political resolutions, either through ideologically-driven clashes or through the give-and-take of bargaining among the interested parties. Conversely, one might depend on bureaucratic standards of consistency and internal accountability to assure a fair resolution. Lurking in the background is another possibility, the determination to let the private market fix policy outcomes by matching supply to demand; this course enables individuals in effect to be their own policy sovereigns, subject to varying degrees of regulation.[14]

The appeal of legalization, among these various conceptions, resides in its promise to secure accountability by subordinating the decisions of policy makers to norms enshrined in a constitution or enacted by statute. In this, legalization really encompasses three distinct, although related, phenomena. It may secure accountability by obliging that policy-makers be faithful to substantive norms of liberty or equality in the operation of the schools; or by insuring that decisions are made by the right decider, enforcing a norm of legitimacy; or, finally, by focusing on the process of decision, introducing accountability either into the way policy gets made, as for example in the requirement of notice-and-comment rule-making, or in the application of policy, by requiring procedural safeguards for affected individuals. In this third aspect, legalization shares much with ideas of bureaucratic regularity, insofar as each requires that decisions be made according to rules (although legal rules and bureaucratic regulations may be importantly different).[15] Legalization departs from bureaucratic accountability to the extent that its model of fairness is inspired by adjudicative proceedings, insisting on rights of representation and on a neutral decider.

The appeal of legalization is in certain respects universal, especially when professional, bureaucratic, or representational accountability seems harder to secure, and each of the four nations relies to some degree on the norms and forms of law. Yet only in the context of particular and quite distinctive national concerns does the idea of legalization acquire meaning and specificity. In part II, we describe the experience with legalization in each country, placing that experience in the context of the country's legal, political and educational systems. Part III sets forth the patterns which emerge from this comparison. In Parts IV and V, we take some tentative steps toward an explanation of the variations in the pattern of legalization, focusing first on legal and political institutions and, second, on educational institutions themselves.

14. See Lindblom, *Politics and Markets* (1977).
15. Infra text at 677-78.

LEGALIZATION IN EDUCATION: THE EXPERIENCE OF FOUR NATIONS

Legalization in education is not new. Rules about schooling appear in early statute books, and courts were adjudicating the rights of those claiming to be mistreated by institutions of learning, at least as early as the eighteenth century.[16] Only since World War II, however has legalization in its contemporary usage—reliance on courts to settle disputes and adoption of legal forms within schools—acquired significance in Western nations generally, and particularly in each of the four nations being studied. This development has occurred in pace, if not in harness, with the modernization of the educational systems of those countries. More particularly, the emergence of equality and liberty as setting to a greater or lesser extent the terms on which education is provided has led in each instance to a reconceptualization of the place of law.

A. The United States

1. Historical Context

Because the American experience is at once the richest and the most familiar, a brief thematic summary of the development of legalization serves usefully as a benchmark against which to assess experiences elsewhere. The early history of American schooling is only incidentally a history of law-making.[17] The law was used, to be sure, in the nineteenth century to entice communities into establishing public schools, and later to impose particular citizenship rules and to codify schooling practices in conformity with models of "scientific" administration.[18] Yet until the second half of this century, though, legal institutions for the most part merely reinforced majoritarian political claims to normative dominance. Even the Supreme Court decisions in the 1920s concerning compulsory instruction in English and compulsory public schooling, which delimit the state's authority, also affirm the considerable power of government to fix the terms of education.[19]

The courts also supported the values of the educational system, lending stability to the professional values of administrators by giving their values normative force, rendering them into rules. While student- and teacher-rights cases date back more than a century, the decisions in such cases were of less moment than decisions about

16. See R. v. University of Cambridge (1723) 1 Str. 557 (C.A.).

17. See Tyack, "Voices of the Law: Historical Perspectives on the Legalization of Education," in *School Days*, supra n. 1; Friedman, "Limited Monarchy: the Rise and Fall of Students' Rights," in Kirp, id.

18. See, e.g., Callahan, *Education and the Cult of Efficiency* (1962).

19. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

fiscal and contractual matters relating to the management of the educational system. The law and the educational establishment looked upon schools not as a fountainhead of personal freedom but as an infant industry, a contributor to the economic and political development of the republic. For the individual, public schooling was a privilege, to be offered on the school's own terms, with those terms granted normative status by the courts.

A limited niche for law well suited a world where decision-making authority rested in the tens of thousands of school districts that constituted the lowest but most significant reaches of a disorderly federal system, and where professionals and local political oligarchs could impose their conception of the proper aims of education on the politically weaker members of the community.[20] It was a world relatively inattentive to the concerns of the least well off—the poor, racial minorities, the handicapped, the limited English-speaking, and women—for unequal treatment was part and parcel of the consensus.[21] Also dominant was an authoritarian conception of schooling, valuing order and discipline over democratic norms within the institution.[22] As an early school law authority wrote: "Education formulated by the State is not so much a right granted pupils as a duty imposed upon them for the public good."[23]

2. Legalization and Education

Dissatisfaction with both elements of this consensus—its shabby treatment of the have-nots and its commitment to hierarchical school governance, single-mindedly furthering the ends of the state—fueled a social movement in the years following World War II.[24] The push for racial equality was the movement's first and most powerful concern, but this campaign was swiftly followed by other reform efforts as the gamut of have-not groups sought to emulate the success of blacks. Although the movement reached well beyond schooling to touch upon many aspects of the social order—it sought the redistribution of economic resources, the restructuring of the apparatus of participation, and the redesign of the social opportunity

20. "[School] boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account . . . There are village tyrants as well as village Hampdens, but none who acts under the color of law is beyond reach of the Constitution." West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

21. See, e.g., Tyack, *The One Best System* (1974); Spring, *The Sorting Machine* (1976); Fass, "The New Deal: Anticipating a Federal Education Policy," in *School Days*, supra n. 1.

22. See, e.g., Katz, *Class, Bureaucracy and Schools* (1975).

23. Quoted in Tyack, supra n. 17.

24. See Kluger, *Simple Justice* (1975); Pole, *The Pursuit of Equality in American History* (1979).

structure—the perceived importance of education in remaking the lives of the next generation assured education reform a prominent place in the larger struggle.

The movement did not rely exclusively on the law. It demanded that central government adopt as national policy a political commitment to greater egalitarianism, thus overriding local power structures; it also sought to undermine the professional consensus that supported unequal and hierarchically run educational institutions. But the forms and forces of law were central in this campaign. Faced with an unresponsive political system, on the one side, and on the other a judiciary that had begun to forge the Equal Protection Clause of the Fourteenth Amendment into a potent tool of social change, the civil rights movement understandably focused on winning from the courts what the political and professional regimes would not concede.

The record of judicial successes is well-known.[25] The most famous of the decisions brought a concern for equality to the school. Racial desegregation; assurances of some special attention to the needs of the children of illegal aliens, the non-English speaking, and the handicapped; disavowals of the most evident discrimination against women: all were decreed by the judges in the decades following the 1954 decision in *Brown* v. *Board of Education*.[26] Although the Supreme Court proved unwilling, two decades after *Brown*, to undo school financing patterns which favored wealthy school districts, several venturesome state courts took up the slack.[27]

Liberty-based entitlements also received judicial recognition. The claims of students as "persons" under the Constitution were addressed by a judiciary that made student rights, not "pupil control," the legal watchword.[28] Students were granted substantive rights of expression in the schoolhouse; courts countenanced critical high school newspapers and political badges; even the length of students' hair was recognized as a personal statement constitutionally worth protecting.[29] The disciplinary authority of the schools was restrained by a regime of procedural fairness which insisted upon some type of hearing even before such relatively minor disciplinary

25. This record is set out in *Educational Policy and the Law*, supra n. 8.

26. 347 U.S. 483 (1954).

27. See, e.g., Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 124, 96 Cal. Rptr. 601 (1971); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972).

28. The cases are collected in *Educational Policy and the Law*, supra n. 8. at 177-222, 240-272.

29. See, e.g., Punke, *Social Implications of Lawsuits over Student Hair Styles*, (1973).

measures as three day suspensions could be imposed.[30] Concerns for religious liberty were also acknowledged in opinions barring prayer from the schools and limiting the state's authority to compel school attendance.[31]

Such judicial decisions empowered a social movement and gave it a legalist cast. Between 1946-56 and 1966-76, the number of federal cases concerning education multiplied almost eleven-fold, from 112 to 1273.[32] Those cases placed equality and liberty on the normative forefront of educational policy.[33] Armed with favorable judicial precedent, advocates for the disadvantaged were able to win from federal and state governments entitlements of a specificity not contemplated in the court opinions. Sometimes, as with the treatment of the handicapped, these took the form of procedural protections, due process rights within the educational apparatus.[34] On other occasions, as with legislation concerning sex equity, concepts of discrimination first developed by the judiciary were codified into legislation.[35] Not all of these developments were driven by legalization, of course; the growing centralization of educational governance was at least as significant to the movement.[36] A favorable political climate, not an appeal to rights, led Washington to concentrate its attention and dollars on the educationally disadvantaged. Often, as in the civil rights campaign of the 1960s and as in the press for fair treatment of the non-English speaking and the handicapped in the 1970s, centralization and legalization worked hand in hand. Congress assumed new federal responsibility in these domains and defined its policy interests in terms of legal rights, relying on the teaching of the courts. This new vehicle of education policy, motored by the engine of rights, acquired preeminent authority in realms previously dominated by localist politicians and professional groups.

Legalization has not become the chief instrument of policy. But law has been transformed from the "least dangerous" policy apparatus into one whose status rivals that of politics and professionalism.[37] Law is still deployed to keep the system running smoothly, even if these traditional suits receive limited attention; more vitally,

30. See, e.g., Goss v. Lopez, 419 U.S. 565 (1975).

31. Abington School District v. Shempp, 374 U.S. 203 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

32. Tyack, supra n. 17.

33. See Kirp, "Law, Politics, and Equal Educational Opportunity: The Limits of Judicial Involvement," 47 *Harv. Educ. Rev.* 117 (1977).

34. See generally, Neal & Kirp, "The Allure of Legalization Reconsidered: The Case of Special Education," *L. & Contemp. Prob.* (1984, forthcoming).

35. See Kirp, supra n. 33.

36. See Wirt & Kirst, *The Political and Social Foundations of Education* (1975).

37. For a critical view of these developments, see Bickel, *The Supreme Court and the Idea of Progress* (1978); Horowitz, *Courts and Social Policy* (1977).

law has become a significant force in transferring, not merely confirming, authority over American schooling. And the domain of law has expanded to encompass questions of governance inside and outside the schoolhouse. These changes can fairly be described as revolutionary. Alexis de Tocqueville's historic observation about American governance, that "scarcely any political question arises that does not, sooner or later, get converted into a judicial question"[38] has come true for education in our time.

B. Great Britain

1. Historical Context

The record is instructively different in other nations. Consider the British case. Public primary schools were established in Britain only in 1870, and on terms very different from those then prevalent in the United States.[39] The idea of a school that was "common in the highest and best sense of the word," as New York education commissioner Henry Barnard wrote, "common because it is good enough for the best, and cheap enough for the poorest family in the community,"[40] was dismissed as dangerously radical. State schools in England were designed to preserve the poor in their station. "The lower classes ought to be educated to discharge the duties cast upon them. They should also be educated that they may appreciate and defer to the higher cultivation when they meet it . . . ."[41]

The British 1870 Education Act was avowedly inegalitarian. It provided only primary instruction; secondary schools remained the preserve of those who could pay the school fees. Even though restrictions on further education for the poor were gradually eased in the early years of this century, as late as 1938 four out of every five British youngsters left school at age fourteen—this at a time when nearly all Americans of the same age remained enrolled in school. As Morris Janowitz notes, "perhaps the most significant difference between the institutional bases of the welfare state in Great Britain and the United States was the emphasis placed on public education—especially for lower income groups—in the United States."[42]

The 1944 Education Act, which marks the beginning of the mod-

38. De Tocqueveille, *Democracy in America* 290 (1957 ed.).

39. The early history of British state education is recounted in Wardle, *English Popular Education 1780-1970* (1970); Lowndes, *The Silent Social Revolution* (1937).

40. Quoted in Bestor, *Educational Wastelands: The Retreat from Learning in Our Public Schools* 26 (1953).

41. Quoted in Wardle, supra n. 39 at 25. (Robert Lowe, Vice President of the Privy Council on Education, speaking in the debates preceding the passage of the 1870 Education Act).

42. Janowitz, *Social Control of the Welfare State* 34 (1976).

ernization of British education, ended some of these disparities. The legislation introduced universal secondary education to age sixteen and abolished fees in state-maintained schools. Yet that reform left in place a highly stratified secondary school system. Differentiation came on the scene as a replacement for the early weeding out of pupils. Students were assigned to grammar, technical, or secondary schools on the basis of their performance on the "eleven plus" examination. Students had no say in the selection process—nor, for that matter, in any aspect of their education. Although the 1944 Act gave substantial new powers to central government, the school heads remained dominant. Neither the central bureaucracy nor the local politicians had much control over how schools were run. Such influence as was exercised by what is now the Department of Education and Science (DES) came mostly from the force of suasion, from the counsel of professionals who formed an educational inspectorate attached to the central government. Despite calls by independent select committees for reform, the model of school governance was (and remains) localist and essentially authoritarian, with no concept of rights to mediate between the individual and school authorities.[43]

The unfairness of an educational system that largely reflected existing class divisions became a political issue in the years after World War II. Comprehensive secondary schooling, the long-standing American model, was advanced as the instrument of equalization.[44] Yet even as Britain was moving rapidly to expand its social welfare system by offering new health and social security benefits, the introduction of comprehensive schools on a widespread basis was delayed until the 1960s, when the Labor Party returned to power.

The campaign for comprehensive schools was essentially political in nature, though it was given professional support by an influential study which concluded that the selection exam largely reflected variations in background and environment, not differences in ability.[45] The Labor government prodded local authorities into adopting comprehensive education by soliciting plans for reorganization of the schools and by conditioning construction funds for new schools on their being compatible with comprehensive reorganization. By 1977, nearly 80 percent of all British secondary school

43. See generally Kogan, *Educational Policy-Making* (1975); Litt & Parkinson, *United States and United Kingdom Educational Policy: A Decade of Reform* (1979); Parkinson, "Policy and Policy Making in Education," in Hartnett (ed.), *The Social Sciences in Educational Studies* 114 (1982).

44. On comprehensive education in Britain, see generally Rubenstein and Simon, *The Evolution of the Comprehensive School 1926-1966* (1969).

45. Floud & Halsey, *Social Class and Educational Opportunity* (1956).

youngsters attended comprehensive schools.[46]

2. Legislation and Education

In the context of British education, where inequality has been the historical norm and policy change has been slow in coming, the development of comprehensive education may fairly be characterized as revolutionary. But unlike the United States, in Britain the court played no part in that revolution; nor indeed has the law had much to do with the shaping of British education generally.

No one went to court seeking to undo the stratified system of British education, and it is easy enough to see why. The absence of a written constitution limits the authority of British courts. Official conduct exceeding its statutory warrant may be condemned by a court as *ultra vires*—a considerable power where there is ambiguity in the enacting legislation—but official acts authorized by statute are beyond review.[47] There was certainly nothing legally impermissible about stratification. On the contrary: the 1944 Act speaks of "such variety of instruction and training as may be desirable in view of the students' different ages, abilities, and aptitudes," and clearly contemplates perpetuation of the three-tiered system.

The courts did not go unused in the long political dispute over comprehensive education but, instructively, they were relied on to challenge, not promote, reform. In two instances, parents sought to block comprehensivization, arguing in one case that the new policy did not pay sufficient heed to the wishes of parents and in the other that appropriate procedures for ministerial approval had not been followed. The parents failed in the first of these test cases, and although the parents' point was upheld in the second, DES quickly rectified the technical deficiency on which the short-lived victory had rested.[48] More significantly, when DES sought to hasten the transformation to comprehensive schools, rejecting a local authority's proposed postponement, the House of Lords did intervene on behalf of the parents and the local authorities to retard comprehensivization. In *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council*,[49] they overturned the DES determination, asserting that the department could act only if no

46. Meredith, "Executive Discretion and Choice of Secondary School," [1981] *Pub. L.* 52, 59 n. 39.

47. On the British legal system, see Morrison, *Courts and the Political Process in England*, (1973). See also Jackson, *The Machinery of Justice in England* (1977) and Schwartz & Wade, *Legal Control of Government* (1972). The American and British systems of administrative law are compared in Jackson and Schwartz & Wade.

48. Wood v. Ealing London Borough Council (1966 [1967] Ch. 364; Bradbury v. Enfield London Borough Council [1967] 1 W.L.R. 1311 (Court of Appeal).

49. [1977] A.C. 1014 [hereinafter cited as *Tameside*]. See Note, "English Judicial Review and the Politics of Education: Secretary of State for Education and Science v.

"reasonable" local authority could adopt such a course of action.[50]

The British judicial record is also generally devoid of decisions supporting equality-based education claims. Policy toward racial minorities, who constitute some four percent of British schoolchildren, has been shaped outside the courts, with an eye to the virtues of inexplicitness and not to the preservation of rights. Those few tests of sex discrimination involving female students denied access to vocational or sports programs have been dismissed in the lower courts with opinions amounting to scarcely more than a smirk.[51]

With regard to students' liberty-based claims, the record of the British courts is mixed. On the one hand, constitutionally based claims to freedom of speech or religious freedom cannot be lodged in a system where rights are defined by Parliament, not by the courts. On the other hand, British courts have historically asserted the power to afford due process-like protections, insisting that individuals deserve notice and the opportunity to be heard by an impartial decider when their liberty or property interests are threatened by a proceeding that is adjudicative in nature: for instance, university students have been held to have a right to this kind of procedural "natural justice" when threatened with expulsion on non-academic grounds.[52] But when university students have actually asserted this right, British judges have evinced more concern with buttressing the authority of school administrators than with the niceties of notice and the need for hearings. Thus, in applying the rule of natural justice in cases involving higher education, British courts have been able to find ways to overlook the presence in an ostensibly neutral panel of the persons who initially recommended discipline and who had already conducted one review of their own determination. They have found ways to excuse the institution's failure to give notice that a hearing would take place. In other cases British courts have ignored admitted breaches of natural justice because in one instance the affected student waited six months before complaining or because the "offense was one of a kind which mer-

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Tameside Metropolitan Council (H.L. 1976)," 17 *Colum. J. Transnat. L.* 144 (1978) [Hereinafter cited as Note, *English Judicial Review*].

50. The decision in *Tameside* has been critized as betraying the fundamentally conservative values held by the British judiciary generally. See Griffith, *The Politics of the Judiciary* (1977). Although DES eventually obtained a parliamentary mandate overturning *Tameside*, the essential conservativism of the judicial position did not pass unnoticed; DES's traditional timidity in confronting local authorities was reinforced.

51. See generally Kirp, *Doing Good by Doing Little: Race and Schooling in Britain* (1979) (showing that even where Parliament has acted against discrimination, as in the Race Relations Act, the courts have maintained a low profile).

52. Hartley & Griffith, *Government and Law* 328 (1975); Schwartz & Wade, supra n. 47 at 241-247.

ited a severe penalty."[53] Strict adherence to the requirements of natural justice is reserved for threats to property rights, or to impose procedural requirements on a nonfavored institution, like a labor union: when students are involved, the rules are interpreted as narrowly as possible.[54]

For elementary and secondary school children, no court cases secure procedural safeguards. Suspensions and expulsions are regulated only by the school's articles of governance (which the parents have no legal right to see) and which typically assign disciplinary authority to the head teacher "for any cause which he considers adequate."[55] A significant minority of the local authorities incorporate some right to appeal, but in most instances, appeals are more in the nature of a parent-teacher conference than a hearing on factual guilt.[56]

British courts have taken a conservative stance in those education issues that have come before them; more important, though, is the fact that their efforts have been modest. Broad policies are fixed in Parliament, where governmental responsibility is conventionally regarded as properly lodging. It is Parliament, not the courts, that is supposed to protect individuals from oppression; political accountability, not law, that is meant to regulate relationships in the public sector. The politicians and the courts both have in turn deferred largely to the professionals. At the school level, the professional competence of headmasters is recognized by a political rule which gives them broad discretion and by a judiciary loath to review, let along reverse, professional determinations in the "secret garden of education."[57]

3. Portents of Change

In several respects, however, the tendency to eschew legal norms and forms appears to be diminishing. For one thing, Britain has ratified the European Convention on Human Rights, thus subjecting British policy to external legal review by the Commission of Human Rights and the Court of Human Rights.[58] For another thing, there is a fledgling British movement toward establishing a Bill of Rights enforceable by courts with the power of judicial review of legislation, a movement traceable both to international influence

53. Griffith, supra n. 50 at 164.

54. Id. at 151-166.

55. ACE "Suspensions Survey," *Where* 166 (March 1981). See also Freeman, "Children's Education and the Law," *LAG Bull.* 212 (Sept. 1980).

56. ACE "Suspensions Survey," supra n. 55 at 23.

57. Schwarz & Wade, supra n. 47 at 51.

58. See generally Cappelletti, supra n. 7 at 146.

and to internal pressures.[59] Claims premised on conceptions of liberty and equality, infused with significance by cutbacks in British education, are also beginning to find their way into the courts. Most important, the Education Act of 1980 has added into British education some of the language of rights, with its emphasis on the duty to provide education and on the right of parents to express a preference as to the child's education. The Act has introduced some procedural safeguards as well; hearings and appeals now constitute part of the decision-making apparatus of the schools.

a. The European Covention on Human Rights

British law developed in splendid isolation, with the experience of other countries treated as generally irrelevant. But Britain's ratification of the European Convention on Human Rights, and the enforcement of that Convention by the European Commission and the Court of Human Rights, changes all that.[60] The Convention is effectively a constitution, containing the guarantees against discrimination, cruel and unusual punishment, incursions of free speech and other fundamental liberties that one expects in constitutions; it also explicitly obliges its signatories to respect the "right of parents to ensure such education in conformity with their own religious and philosophical convictions."[61]

Until recently, the Convention and its judicial apparatus were widely disparaged in Britain. Yet more cases have come to the Human Rights Court from Britain than from any other nation.[62] And the Court's opinions do make a difference. When the Court struck down a Scottish rule authorizing corporal punishment,[63] DES felt obliged to give parents the right to determine whether schools might paddle their children, and even that new rule may not withstand continued legal challenge. The corporal punishment case is the first British education dispute to be decided by the Human Rights Court, but it will not be the last. Challenges to the treatment of women, racial minorities, and the handicapped in the schools are likely, particularly as advocacy groups, formed in recent years on an avowedly American model, are rebuffed in their attempts to bring about reforms within the British system.

The direct impact of the decisions of the European Commission and the European Court of Human Rights is not likely to be great;

59. See, e.g., Scarman, "Fundamental Rights: The British Scene," 78 *Colum. L. Rev.* 1575 (1978).

60. Id.

61. European Convention on Human Rights, Protocol 1, Art. 2 (18 March 1954).

62. See Lester, "Fundamental Rights: The United Kingdom Isolated?," [1984] *Pub. L.* 46, 65.

63. Campbell and Cosans v. United Kingdom, [1982] 4 E.H.R.R. 293.

the Convention has not resulted in dramatic changes in the conditions existing in any of the signatory states.[64] The Court's orders are merely declaratory: they do not bind a government to do anything. Without the power to order broad-scale institutional changes in requiring positive allocations of resources, the Court cannot directly bring about the kinds of reforms these new advocacy groups seek. Yet the Court performs a valuable function in publicizing and condemning conditions that depart from the terms of the Convention, and in some cases national legislatures have acted to promote compliance with the Convention.[65] Rights adjudicated in a forum that resembles a national constitutional court, derived in part from the constitutional decisions of courts in other nations (including, notably, the U. S. Supreme Court), seem likely increasingly to insinuate themselves into British law.

b. A British Bill of Rights

Indeed, commentators point to the Convention and to the European Economic Community Treaty, along with the growth of the welfare state, as influences pushing Britain toward a Bill of Rights.[66] Although a select committee of the House of Lords narrowly expressed its approval of a Bill of Rights in 1978,[67] such a bill is unlikely to be adopted in the near future. Yet the character of the debate is enlightening nonetheless. As Lord Diplock has said, "the real issue is the supremacy of the legislature."[68] The key question is whether judges will be given "a constitutional role of first importance in the task of determining and delimiting what are the operative values in their society."[69] The prospects are so slim precisely because this would mark such a departure from long-accepted tenets of parliamentary supremacy.

Even were the prospects brighter, however, it is not so clear that introduction of a Bill of Rights would result in the kind of legalization typified by the American experience nor that recognition of new rights with powerful redistributive potential would be forthcoming. The push for a Bill of Rights is part of the Conservative

64. Brownlie (ed.), *Basic Documents on Human Rights* 242 (1981).

65. Id. Thus, British prison regulations found in contravention of the convention were changed shortly after the Court's decision in Golder v. United Kingdom. Series A, Vol. 18, *Publications of the European Court of Human Rights* (Judgment of 21 February 1975). See Karst, "Judicial Review and the Channel Tunnel," 53 *S. Cal. L. Rev.* 447, 456 (1980).

66. Scarman, supra n. 59. See also Karst, supra n. 65.

67. Id.

68. Diplock, "On the Unwritten Constitution," 9 *Isr. L. Rev.* 463 (1974) (on the advisability of adopting a written constitution in Israel).

69. Abernathy, "Should the United Kingdom Adopt a Bill of Rights?," 31 *Am. J. Comp. L.* 431 (1983).

Party agenda; Labor is firmly opposed. British judges are conservative in composition and in outlook,[70] and there is some reason to suspect that increased judicial activity would be restrictive, not expansive, in the field of social and civil rights.

c. Scarcity and Litigation

The improbability that British courts would use increased powers to equalize the distribution of such services as education reflects the broader fact that equality does not hold the same appeal in Britain that it does in America. The abstractness of the concept makes it suspect in a nation where politics routinely means muddling through, not searching for principled solutions: in this respect the comprehensive schools movement was a decided exception. The aspiration, in education as in other social services, has been to enable professionals, through the exercise of benign discretion, to offer the highest level of service possible with the resources available. Progress has meant providing more, to more people, over time. In that policy environment, a community that lacked some educational amenity available elsewhere—nursery schools, for instance—could fairly presume that it would eventually enjoy similar benefits. Presumptions like this lend themselves to an inexplicit and consensual form of dispute resolution fundamentally inconsistent with litigation.[71]

Such an approach, which equates fairness with doing more for everyone according to professional criteria of need, fares badly in times of fiscal stringency.[72] When services are not being expanded but actually reduced, inequities attract more attention. Confronted with a government committed to cutbacks and with conservative local authorities which share the government's philosophy, citizens' groups have begun to look to the courts for redress. Parents in one county were able to convince a court that, on an appropriate factual showing, an injunction should be available to force legal authority to open a school closed by a labor dispute.[73] Parents in another county insisted successfully that the local authority provide statutorily mandated nursery education. Elsewhere, parents challenged fees for instruction in music. Parents in Oxfordshire threatened to go to court over the failure of the authority to provide adequate education to handicapped pupils over age sixteen, and won an order from the

70. See Griffith, supra n. 50.

71. Shapiro, *Courts* 14-15 (1981). See also Kirp, supra n. 51.

72. On the shifts in policy that can accompany such a change, see Burgess and Travers, *Ten Billion Pounds: Whitehall's Takeover of the Town Halls* (1980); McAllister & Hunter, *Local Government: Death in Our Time* (1980).

73. Meade v. Haringey London Borough Council [1979] 1 W.L.R. 637 (C.A).

Secretary of State.[74]

The impact of these actions has been mixed. Because parents can only press rights assured by statute, it remains open for government to amend the law. That is just what happened in the nursery school case, where nursery education was made an optional offering. The victory in the music tuition suit also proved pyrrhic, for the local authority simply ended all instruction in music. The Oxfordshire parents were left complaining that the inadequate hours of instruction offered to their handicapped younsters rendered worthless the Secretary of State's order.

These disputes address the particularities of expenditure cutbacks; broader-based tests of the adequacy of educational expenditure may eventually be forthcoming. Buttressed by a report of the inspectorate, which noted that the level of services in four authorities had fallen so low as to pose "a serious threat to the maintenance of standards,"[75] parents in Surrey lodged a complaint with DES, alleging that education there had fallen below the minimum level of adequacy required by section 8 of the 1944 Act. A proposed amendment to the Education Act would convert nationally agreed-upon guaranteed basic services—in effect, a guaranteed minimum—into a legal entitlement. That is more than the U. S. Supreme Court was willing to insist on in the school finance case.

d. The 1980 and 1981 Education Acts

The internationalization of education law and the elaboration of judicially enforceable claims to equal or minimally adequate treatment are speculative possibilities, but the expansion of libertarian claims is present fact.[76] The 1980 and 1981 Education Acts have introduced the language of rights into the British schools. What was in the 1944 Act a mere directive to consider parental preference in school assignments, held by the courts to be "nonjusticiable," has been transformed into an entitlement. The 1980 and 1981 Education Acts authorize parents to appeal decisions concerning school placement to a quasi-autonomous panel, whose decisions are binding on the local authority. Thus, parents anxious to have their child enrolled in the local grammar school or wishing special class placement for their handicapped youngster may now press the matter in

74. Interviews with Stuart Maclure, editor, *Times Educational Supplement*; Tom Brighouse, Chief Educational Officer, Oxfordshire Local Education Authority; and Peter Newell, Children's Legal Centre, London, June, 1982. The cases are not reported.

75. *HMI Report on the Effects of Expenditure Policies in 1981 on the Education Service in England* (HMSO, 1982).

76. See generally Bull, "School Admissions: A New Appeals Procedure," *J. Soc. Welf. L.* 209 (July 1980); Marson, "Parental Choice in State Education," *J. Soc. Welf. L.* 193 (July 1980); Meredith, "Executive Discretion and Choice of Secondary School," [1981] *Public L.* 52.

a forum that relies less on professional discretion, more on the application of agreed-upon criteria to particular cases—less, that is, on expertise and more on rules. The right of appeal is new, and has been relied on in varying degrees. In some authorities, such as Oxfordshire, fewer than 100 appeals were lodged during the first year of implementation; in London, by contrast, 1,246 of the 20,000 placements of 11 year-olds were contested, and some individual schools faced as many as 75 appeals.[77]

Both acts are riddled with exceptions to the proposition that parental preference is controlling. Parental choice remains limited, for instance, by the local authority's determination of the efficient use of its resources; and authorities set their own criteria of admission, relying variously on such benchmarks as place of residence and the range of curriculum offering. Anecdotal evidence from the first of appeals indicates that relatively few parents will be successful: one London appeals panel allowed just 3 out of 160 appeals. Yet these statutes do limit the discretion of local professionals by exposing their decisions to review, and that works a change.

Although the procedural mechanisms installed by the 1980 and 1981 Acts mark a step in the direction of legalization, many aspects of the appeals procedure are strikingly non-legalistic. Parents do have the right to be represented at the appeals board hearing, and a right to a decision in writing, but the discretion of the local authority is not limited by rules promulgated in advance. Further, the idea of a neutral decider, inherent in the concept of the rule of law, is not part of the apparatus. While there is some effort to ensure that the appeals board is impartial, the terms of the debate over the board's composition reveal not a concern for "judicial" neutrality, but rather for fair representation. Thus, elected local educational authority members sit on the panel but may not constitute more than a simple majority, and the ongoing debate about the propriety of parent members has focused solely on questions of representation and legitimacy, not bias nor impartiality.[78] In this, the appeals board for educational disputes is even less "legal" than most British tribunals, which are at least chaired by a lawyer; no lawyers sit on the appeals panels created by the 1980 and 1981 Acts.

In the United States, administrative appeals are explicitly modeled on judicial proceedings. They are intended to mirror the adversary proceedings typified by courts. The legalistic character of American administrative law has been attributed to the role lawyers and judges played in the design of those proceedings.[79] The demand

77. *Times Educational Supplement*, 11 June 1982, p. 3.

78. Bull, "The Anti-Discretion Movement in Britain: Fact or Phantom?", *J. Soc. Welf. L.* 65 (March 1980) and Bull, supra n. 76.

79. Schwarz & Wade, supra n. 47.

for procedural safeguards originated with judges, who found hearing rights mandated by the due process clause of the Constitution, and lawyers played important role in the design of the proceedings. The origins of appeals tribunals in Britain generally are by contrast nonjudicial: the work of the Franks Commission, chartered by Parliament, prompted their introduction.[80] And as for the Education Act's appeals procedures, their nonlegal characteristics have been directly attributed to the conspicuous lack of participation by lawyers in their development. The designers of the appeals system were bureaucrats and educators, not lawyers.[81]

Even the limited degree of legalization the appeals process represents is not without its critics. Laborites, generally critical of lawlike forms, worry that the well-off and articulate will make best use of the new procedures, thus widening social class differences.[82] Administrators fear that legalization will become legalism, unwarranted rule-mindedness, noting the "detailed and time-consuming procedures (67 weeks minimum on our latest count if the parent takes us through all of them)" and expressing "apprehension that the good informal relationships that have been painstakingly built up with the professionals and parents, could be undermined by the intrusion of the legal processes. . ."[83]

The appeals systems represent the most apparent evidence of legalization in Britain to date. Like the demands for a minimum standard of services, they promise a measure of fairness when scarce goods are being rationed, and thus divert attention from the nation's inability to provide all children with the services that the educational inspectorate treats as essential.

C. The Federal Republic of Germany

1. Historical Context

Germany established a state system of education subject to the control of bureaucratic and legal norms far earlier than either Britain or the United States. Public education was securely in place in the eighteenth century when Prussian governmental edicts aimed at assuring a literate population introduced a "form of educational conscription."[84] Fifty years later, much of the school-age population was obliged to continue instruction beyond the primary level.

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80. Jackson, supra n. 47.
81. Bull, supra n. 78.
82. Interview with Christopher Price, MP, June 1982.
83. Letter from J. A. Springett, Association of Metropolitan Authorities Education Officer, to B. C. Peaty, Department of Education and Science, 8 February 1982.
84. Barker, *The Development of Public Services in Western Europe 1660-1930*, 86 (1943).

As in Britain, the German educational system was initially differentiated, with distinct types of programs tailored to those with particular career aspirations.[85] But in Germany, unlike Britain, the degree of differentiation was deliberately exaggerated during the nineteenth century. Early in the century, the academic high school or *gymnasium*, served as a quasi-comprehensive school, enrolling half of the youth subject to compulsory education. By the end of the nineteenth century, though, the *gymnasium* had become an elite institution. Only 15 percent of those in school were attending *gymnasia*; the rest had been shuttled off to the general education program of the *realschule* or the vocationally-oriented *hauptschule*.[86] Educational opportunities were allocated to suit the interests of the state: the Minister of Education reported to Parliament in 1889 that the capacity of academic high schools would be restricted to "what is needed for the replenishment of the so-called ruling classes."[87] While the United States conceived of education as the cornerstone of its social welfare policy, believing that education could make individuals—and, hence, the society—better off by encouraging social mobility, Germany took a different path. It initiated a social security system designed to improve "the position of the working class . . . in order to reduce the aspirations for trying to get out of it,"[88] even as it restricted educational opportunity to maintain social divisions.

German schools, avowedly inegalitarian in character, were also authoritarian in structure. Even as state bureaucrats fixed the general terms of schooling, the headmaster's word was law inside the school. The Hamburg administrative court was willing as early as 1923 to hear out the complaint of a student denied admission to the *gymnasium*, but once in school students had no rights, for they were not regarded as legal persons. Instead, the students were subject to a "special authority relationship," beholden to educators whose rules were absolute commands. The relationship between students and school administrators was a matter of internal state governance, not subject to the norms regulating the relationship between citizens and the government generally. Students' legal status in relation to the institution was like that of soldiers, prisoners, or the mentally ill.[89]

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85. The historical discussion draws largely on Heidenheimer, "Education and Social Security Entitlements in Europe and America," in Flora & Heidenheimer (eds.), *The Development of Welfare States in Europe and America* 269 (1981); and Anderson and Anderson, *Political Institutions and Social Change in Continental Europe in the Nineteenth Century* (1967).

86. Kaeble, "Educational Opportunities and Governmental Policies in Europe in the Period of Industrialization," in Heidenheimer, supra n. 85 at 239, 249-255.

87. Quoted in Heidenheimer, supra n. 85 at 281.

88. Id. at 282.

89. See generally Weiler, "Equal Protection, Legitimacy, and the Legalization of

The German educational system was long regarded as an instrument for national unity, and, because of its high degree of centralization the government could take advantage of this potential, particularly under the Nazis. "The whole end of education" under the Third Reich was to "[burn] into the heart and brain of the youth entrusted to it an instinctive and comprehended sense of race." According to this view, "education must be so arranged that the young person leaving school is not half pacifist, democrat, or what you will, but a complete German."[90] Postwar developments in German education—including, importantly, a change in the role of law—embodied a reaction to this conception.[91] Those changes were hardly radical in nature. Rather, the aim was to restore the educational system that had existed under the Weimar Republic, cleansing the schools of their Nazi propagandizing but retaining the tripartite division of instruction. Comprehensivization was urged by Americans during the postwar occupation but was successfully resisted; conservative opponents could condemn such forms of instruction as politically inspired "reeducation." During the two decades of nonreform following World War II, the educational system remained stratified. "Not more than one out of every five pupils attempts upper-level secondary education, and . . . only five to six percent of secondary graduates are children of workers."[92]

In West Germany as in Britain, the push for reform has concentrated particularily on securing comprehensive education, and in both countries, the impetus has been political.[93] In West Germany a prestigious national commission gave the movement a boost when, in 1969, it proposed a large-scale experiment in comprehensive instruction; under the Social Democrats, the West German education ministry boldly urged going further and ultimately ending the traditional tripartite system. But these brave schemes came to nothing. According to the German constitution, the Basic Law (*Grundgesetz*), responsibility for setting education policy rests with the state parliaments, not the central government, and the more conservative states resisted the initiative: by the mid-1970s, just 4 per-

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Education: The Role of the Federal Constitutional Court in West Germany," in *Rev. Pol.* (Jan. 1985) (forthcoming).

90. Quoted in Hearnden, *Education, Culture, and Politics in West Germany* 4 (1976).

91. See generally Robinsohn and Kuhlmann, "Two Decades of Non-Reform in West German Education," 11 *Comp. Educ. Rev.* 319 (1967); Heidenheimer, Heclo & Adams, *Comparative Public Policy* 44-69 (1977); Weiler, "The Politics of Educational Innovation: Recent Developments in West German School Reform," (Report to the National Academy of Education, 1973).

92. Heidenheimer, Hecklo & Adams, supra n. 91 at 47 et al., supra n. 85 at 47.

93. See Weiler, supra n. 91; Nixdorff, "The Pace of West German Educational Reform as Affected by Land Politics" (Ph.D. diss., University of Florida, 1969).

cent of the students were enrolled in comprehensive schools.[94] The *gymnasium* has remained an elite school, although substantially expanded in enrollment and more flexible in its admissions procedure; and educational success remains largely a function of family background.

2. Legalization and Education

a. Judicial review

The West German courts have found themselves in the middle of the dispute over comprehensive education, even as they have been involved in a host of other schooling questions. The reason for this is partly structural. West Germany has a written constitution that guarantees rights relevant to education: the right to "the free development of his personality," the parents' "natural right" to direct "the care and upbringing of children," the right to religious instruction in public schools, and "the right freely to choose [a] trade, occupation, or profession." Moreover the Federal Constitutional Court has the authority to declare acts of the legislature unconstitutional and its interpretations of the constitution are binding on the regular courts. The Federal Constitutional Court wears three hats. It sits as an advisory body, reviewing legislation at the request of the executive, the legislature, or the states; as a court of original jurisdiction, deciding constitutional issues referred to it while litigation is stayed in lower courts; and as a tribunal to hear individual suits alleging a governmental deprivation of rights under the Basic Rights provisions of the Basic Law (the equivalent of the American Bill of Rights).[95]

Formal structures are one thing, but legal reality may be something else.[96] In practice, however, the Federal Constitutional Court has sought with increasing vigor to carve out for itself an independent role as defender of rights. A 1954 decision dismissing a challenge to nonpromotion on the grounds that this was a pedagogical, not a legal, issue now seems quaint. The doctrine of "special author-

94. The strength of the connection between comprehensive schooling and political party is demonstrated by the fact that of the 178 comprehensive schools in the country in 1980, 125 are located in three states whose legislatures are controlled by the Social Democrats. Korner, "Comprehensive Schooling: an Evaluation," 17 *Comp. Educ.* 15 (March 1981).

95. See Schlesinger, *Comparative Law* 358-359 (4th ed. 1980); See also Neumann, *The Government of the German Federal Republic* (1966); McWhinney, *Constitutionalism in Germany and the Federal Constitutional Court* (1962).

96. The postwar Japanese Constitution, after all, established a Supreme Court modelled after the American tribunal, but that court has made little pathbreaking law. The traditional Japanese aversion to litigation and the preference for negotiated settlement of disputes has kept questions of policy out of the courts. See generally, Tanaka, *The Japanese Legal System* 311 et seq. (1976).

ity relations" has been repudiated with regard to schools. Suits involving freedom of speech, university governance and admissions, comprehensivization, and any number of other educational matters have before the courts, and the judges have eagerly taken these on. As in the United States, education has been a chief focus of judicial activism.

A glance at the education issues addressed by the German courts—among them, whether students can be forbidden to wear political buttons, whether parents can remove their children from sex education classes, whether Latin (not English) can be accepted as the first foreign language, whether educators have discretion to set promotion and graduation requirements[97]—reveals that, in West Germany, as in the United States, the courts play a key educational policy role. Yet the difference in the uses of law are more impressive than the similarities.

For one thing, those who have gone to court in West Germany have generally sought, as in Britain, to undo a liberal reform—comprehensivization, for instance, or sex education. Alternatively, German plaintiffs have asked the judges for some benefit associated with differentiation, such as the right to study in an elite *gymnasium* or the right to attend the university of their choice. Use of the law as an instrument of social change, so evident in recent American experience, is almost without parallel in West Germany. Neither the handicapped nor women have turned to the courts, and there is no NAACP for the sizable number of Turkish, Cypriot, and Yugoslavian guest workers' children.[98] Instead, those who call on the judges would turn the clock back to the days when a command of Latin was the mark of an educated person or would dismiss "social studies" as a disreputable substitute for the study of history. A suit brought in the Bavaria state courts, challenging the expulsion of a student who wore a political button during a recent campaign stands as a conspicuous, but thus far singular, exception to this trend.[99]

For another thing, the decisions of the West German courts have largely emphasized the process and not the substance of policy. The courts have brought an end to special authority relationships generally, declaring that students, like other persons similarly emancipated by the postwar constitution, are equal before the law. And that, in turn, has led to ever more detailed judicial inquiries into schooling practices. Commencing with cases challenging pro-

97. The German cases are cited in Weiler, supra n. 89; Kommers, *Judicial Politics in West Germany: A Study of the Federal Constitutional Court* (1976); Richter, "Law and Education" (unpublished manuscript).

98. See Rist, *Guest Workers in Germany: Prospects for Pluralism* (1978).

99. Discussion with Judge Willberg, Hamburg, 7 July 1982.

motion decisions, judges have delved into grading; from an initial focus on suspensions, courts have turned their attention to such lesser disciplinary measures as banishing students from the classroom. Yet the nature of the court's inquiry, if more minute in its focus, has remained procedural in nature. The judges essentially ask a single question: Has the school followed the rules? It is arbitrariness to which the judges are attentive, not the nature of the educational program or the standards of success set by the system.

b. Deciding who decides

This emphasis on procedural correctness in the context of school disputes betrays a judicial tendency to focus on who makes educational policy, rather than on the content of those decisions. While the Federal Constitutional Court and the Federal Administrative Court usually uphold the government, they have insisted that important policy matters be decided not by administrators issuing regulations, but by legislators exercising their constitutional perogative. The Constitutional Court, for instance, has dictated that the conditions of expulsion be fixed by statute, with only the particulars of policy left to the bureaucrats; whether Latin Could be made the first foreign language was treated by the Administrative Court as properly the province of government, not parents, but as a decision properly made by the legislature and not the ministry. So too with sex education and the comprehensivization of the middle school: the importance of the issues was a reason to insist that the legislature act, not delegate authority. Conversely, the fact that one *land*, or state had reformed the upper grades of the *gymnasia* through legislation was sufficient to satisfy the judges as to the legality of the action.[100]

These cases illustrate the operation of the German administrative law doctrine of *Gesetzesvorbehalt*, or legislative reserve.[101] Simply stated, the doctrine holds that decisions which affect certain fundamental rights of the citizen must be made by the legislature. Mere administrative regulation in these areas is insufficient. Only in minor matters, the length of the school week, for example—is the bureaucracy left to proceed on its own. The doctrine of legislative reserve promotes accountability in the formation of policy by ensuring that decisions have been made by a politically accountable decider, the legislature. As for the application of policy, fairness is guaranteed by ensuring that the bureaucracy follows the rules.

100. Id.

101. For a general discussion of the doctrine of legislative reserve see Linde, "The Constitutional Supervision of the Administrative Agencies in the Federal Republic of Germany," 53 *S. Cal. L. Rev.* 601 (1980). See also Weiler, supra n. 89.

Thus, for example, if an American student were expelled for failing to adhere to a dress code, an American court would determine whether choice in dress were protected by First Amendment guarantees of freedom of expression.[102] The German court, by contrast, might ask whether the authority to implement a dress code had been conferred by the legislature. If it had, the inquiry would then focus on whether the rule was properly applied.

The Federal Constitutional Court has not, however, been wholly silent with respect to the effect of constitutional norms on the substance and structure of education. Consider, for instance, the litigation over comprehensive instruction. While a 1972 challenge to one state's plan to convert its middle schools into comprehensive schools was rejected because the change was appropriately authorized by the legislature, the court did insist that private schooling, protected by the Basic Law, remain available.[103] The Court reached the same balance in a more recent test of Hamburg's decision to incorporate its comprehensive schools into the regular system, rather than maintaining them as experimental. The challenge was summarily dismissed. Schooling alternatives must be available, the Constitutional Court declared, but as long as they are, the state should have free rein in organizing its schools.[104]

In other areas, the Federal Constitutional Court has more forthrightly asserted its preferences. In a suit concerning the social studies curriculum of one state, the court asserted its preference for a curricular approach that encouraged dissent and disavowed an authoritarian conception of the government's mission. So, too, in the sex education case, the Court went beyond insisting that the decision whether to have sex education must be made by the legislature, and required that "[s]ex education in schools must remain open to different value concepts in this field and must in general respect the natural educational right of the parents and their . . . convictions . . . . The school must, in particular, avoid any attempt to indoctrinate the young."[105]

But the preponderent emphasis of education law in West Germany has been to invoke the doctrine of legislative reserve, shifting authority from the bureaucracy, dominant since the reign of Frederick II, to the politically accountable level of government. Such decisions force the state legislatures to consolidate legal norms into a coherent statutory scheme; thus, there are now elaborate legislative

102. See Punke, supra n. 29.

103. Weiler, supra n. 89 at 9.

104. Discussion with Dr. Lange and Dr. Paeschke, Hamburg, 7 July 1982.

105. Kellogg and Stefan "Legal Aspects of Sex Education," 26 *Am. J. Comp. L.* 573 (1978).

codes in many states.[106] The judicial rulings also concentrate ultimate responsibility for education with the politicians. That has been the key consequence of legalization in West Germany.

This pattern of detailed, procedurally-oriented scrutiny has filtered down to the lower courts. The decision to shut a secondary school is often challenged on one or another administrative ground. In one West Berlin school closing dispute, for instance, three separate actions were lodged: by the governing school council, by the teachers, and by the parents. Grading and nonpromotion litigation is a judicial commonplace. There is no parallel in primary and secondary education to the exacting review of university admissions practices under the enrollment limits fixed by statute, but students have been called upon to testify about the treatment of a fellow student by a teacher accused of unfair grading and, where lessons have been lost because of teacher illness, parents have lodged court suits over grades.[107]

c. Legalization in the schools

Judicialization of educational policy has also led to legalization in the schools. A statute adopted by most of West Germany's states, for example, entitles students to an administrative hearing before being dismissed. And matters that have not yet reached the courts become the subject of anticipatory legalization. The demand of Islamic guest-workers that their children receive instruction in Islam within the public schools (even as the tenets of Catholicism and Lutheranism are taught there) may inspire an administrative regulation designed to forestall judicial intervention. In this way, the rule books grow thicker as regularity becomes an element of educational decisions.

3. Legalization in Perspective

The reliance on the norms and forms of law to resolve educational disputes is not without its critics, who complain that the *Rechtstaat* has become a *justizstaat*—a judge's state.[108] The legitimacy of individual court decisions rests in good measure on their being perceived as legal, not political, in motivation; in West Germany, a bright line is drawn between the two. Yet certain decisions—among them the Federal Administrative Court opinion striking down legislation which gave students a voice in university

106. See Weiler, supra n. 89.

107. These cases and those discussed in the following sections were described in interviews conducted in West Berlin and Hamburg, July 1982. See also Weiler, supra n. 89.

108. Lorenz, "The Constitutional Supervision of the Administrative Agencies in the Federal Republic of Germany," 53 *S. Cal. L. Rev.* 543, 581 (1980).

governance as violating professors' constitutionally secured academic freedom[109] and the Hessian state court ruling affording parents the right to determine the upper level curriculum[110]—can only be explained in political terms, so shaky is their legal underpinning.

Critics also voice concern that over-legalization may freeze educational practice, stultifying reform. There is some indication that the judges recognize this possibility. Thus, the Federal Constitutional Court overturned a Federal Administrative Court opinion which insisted that, because promotion was so closely linked to dismissal (for which standards must be set by statute), promotion too had to be regulated by law. The Federal Constitutional Court's opinion left promotion to the discretion of the administrators.[111]

Legalization in West Germany may be seen in another light, however. In the context of a system historically run by bureaucrats and professionals, reliance on the law to bolster political responsibility, coupled with the legislative creation of local school councils, seem altogether salutary developments. Has legalization in West Germany gone too far? That may depend on whether the courts' decisions continue to bolster political authority or begin to usurp it.

Looking to the future, one also wonders whether the guarantee of equality contained in the West German Basic Law will eventually be given redistributionist meaning in the courts. Until now, cases concerning equal educational opportunity have been kept almost entirely out of the courts. Does the less-than-equal treatment of students enrolled in the lowest level of the secondary system and of guest-workers' children pose a legal issue? What besides rule-mindedness does legalization in West Germany betoken?

D. Israel

1. Historical Context

The Israeli experience differs in many ways from that of the countries already discussed. Israel is new: the nation itself dates from 1948, and there was a sizeable Jewish population in modern Palestine only during the preceding half century. Moreover, although the nation was founded largely in response to the decimation of the European Jewish population by Nazi Germany, the majority of the population comes not from Europe, but from economically and culturally less developed North African and Asian countries. Clashes between the traditional values of these Sephardic Jews (or Oriental Jews, as they are commonly called) and the

109. Described in Weiler, supra n. 89 at 20.
110. Id.
111. Discussion with Drs. Lange and Paeschke, Hamburg, 7 July 1982.

dictates of modernization, the pull and tug of ancient religious values and technological imperatives, are more indicative of a developing than a developed country.[112] Yet the nation's commitment to education has been extraordinarily high.[113] Israel came into being as the expression of a learning society and has spent proportionately more on education than almost any country in the world (although relatively less has been expended in the debt-ridden recent years). As in the United States, concern for equality has animated educational policy, especially during the past two decades. The powerful central bureaucracy developed to run the educational system has its evident parallel in West Germany. Ideas about education are imported from elsewhere, notably the United States, for Israel is not an insular country. And law enjoys a pride of place in Israel comparable, among the countries examined, only to the United States: there are more lawyers per capita than in any nation but the United States.[114] Israel thus offers a good setting in which to probe the relationship between litigiousness generally and rights-consciousness about education. More generally, comparisons between Israel and the three western nations cast a usefully different light on legalization.

Education in Israel developed outside of a state framework, among a people lacking sovereignty and autonomy.[115] Throughout the pre-statehood period, education was a politically driven enterprise. Religious, laborite, and centrist political parties ran separate educational systems that sought to advance their competing interests. There was little attempt to reconcile these differences during the pre-state period for fear of sparking a *Kulturkampf*. The several types of schools held different views of Zionist ideology and Jewish values. Even as politics shaped education, paralleling differences among the parties, education shaped politics: of all the social services that the parties offered, schooling had the greatest impact. As one contemporary account lamented: "Politicization has spread like an epidemic among the Hebrew youth of our schools . . . All of the institutions which comprise the central administration . . . are stamped with the factional party spirit."[116]

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112. See generally Smooha, *Israel: Pluralism and Conflict* (1978).

113. See generally Kleinberger, *Society, School and Progress in Israel* (1969).

114. Rueschmeyer, "The Legal Profession in Comparative Perspective," in Jackson (ed.), *Social System and Legal Process* 100 (1977).

115. The discussion of Israeli educational policy relies on Carmon, "Education in Israel: Issues and Problems," in Ackerman, Carmon, & Zucker (eds.), "Schooling in Israel: Education in the Forming of a State" (unpublished ms., 1980, hereinafter cited as *Israeli Schooling*); Elboim-Dror, "Educational Policy-Making in Israel," in *Israeli Schooling*; Baschi, "Elementary School Education," in *Israeli Schooling*; Peled, "The Hidden Agenda of Educational Policy in Israel" (Ph.D diss., Columbia Univ., 1979).

116. Quoted in Elboim-Dror, *Israeli Schooling*, supra n. 115.

Such divisions, tolerable among a subject people, could not survive the creation of a state. Israel's population expanded enormously, doubling within the first two years of the nation's existence, and this prompted the push for a national educational system that would turn this motley population into a nation.[117] The new Israeli government saw education as a central component of nation-building, and the struggle for state control over education paralleled the effort to achieve real statehood. The factionalism that had led to competition among the parties for the educational allegiance of the new immigrant's children was at odds with that aspiration, and so had to be dissolved. This was no minor political decision; indeed, the first elected government resigned over it.

With the 1953 Education Act, schooling came under the dominion of the state. The expression of national purposes in the Act was left purposely vague, but the prominence of the state in matters of education was undoubted. "Political independence," the education minister asserted, "means that the responsibility for the preserving of the spiritual inheritance of the nation is in the hands of the State . . . It is the state's duty and obligation to educate its citizens to a complete identification of each individual with the State, with its future, with its survival."[118] The new nation had little sympathy for claims of cultural relativism. Differences among the ethnic and religious communities that made up Israel were seen as weakening the country, increasing its vulnerability; this was intolerable in a nation where survival has always been problematic. The educational system became institutionalized in good measure to overcome such pluralism.

The several systems did not all exactly disappear—separate religious and ultra-orthodox school systems survive, as do the kibbutz schools—but these were detached from their political roots. Although the orthodox religious schools retained autonomy in matters of religious education, the central government moved to consolidate its authority by imposing a single curriculum on all the schools. For at least three-quarters of the school day, all youngsters are legally required to study the same subjects; variability may occur only at the margin. A state examination, controlling entrance to further education and fixed by the education ministry, brought the disparate schools more fully into conformity with a national norm.

The abiding educational policy concern has remained the education of Israel's African, or Oriental, Jews, who have fared worst in school. As David Ben Gurion, Israel's first Prime Minister, wrote in

117. On the importance of the ethnicity issue, see Eisenstadt, *Israeli Society* (1967); Eisenstadt, *The Absorption of Immigrants* (1954); Smooha, supra n. 112.

118. Quoted in Peled, "The Case of Israel," 33 *Acad. Polit. Sc. Proceed.* 146, 149 (1978).

1962: "If we do not want to become a Levantine nation—and a Levantine Jewish state could not survive—we have to consider the lifting of education of the young generation, *all* the young generation, not only without ethnic discrimination but also without economic class difference, a vital mission, not less important than the mission of security—because it is indeed a security mission."[119]

Oriental Jewish students—offspring of less-well-educated parents, members of a culture that values traditional religious concerns more highly than modern education—have from the beginning done less well academically than the sons and daughters of European Jews. The educational gap, the difference in the rates of participation in the educational system at various levels, has been a policy fixation. That gap—less than one percent in the first year of secondary school, widening to thirty-four percent upon matriculation and to more than forty percent at the university level, paralleled by lower levels of achievement at each level[120]—has been confronted in various ways. Insistence on a uniform education in the 1950s gave way to infusions of new resources, in order to help the Oriental Jews regain lost ground. This policy was followed in the late 1960s by a redesign of the schools' grade structure, in order to encourage greater mixing at the middle school and high school levels, an effort coupled in a few cities with explicit integrationist efforts. Most recently, belated recognition has been paid to the cultural contribution of Oriental Jewry. The curricular revisions of the 1970s, which drew for inspiration on American multicultural curricula, adopt a less tutelary and paternalistic orientation to the non-European groups.

The effort to reduce disparities between these two groups has thus far been a disappointment. The children of Oriental immigrants are still, by and large, educated apart from the second and third generation European Jews as a result of *de facto* segregation; this is particularly true in academically demanding programs. The reorganization of the schools' grade structure remains unimplemented in many communities more than a decade after national adoption of this reform, and deliberate integration has rarely occurred. Additional resources that were supposed to go to the immigrant children have instead wound up in schools serving a largely European clientele, thus actually increasing the resource disparity.[121]

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119. Quoted in Peled, supra n. 115 at 252.

120. Eisenstadt, "Israeli Society: Origins, Institutional Formats and Transformations," in *Israeli Schooling*, supra n. 115.

121. See Minkovich, Davis & Bashi, *Assessment of Educational Attainments in Elementary School in Israel* (1977).

2. Legalization and Education

In the United States such explosive matters of equality policy might well have turned into lawsuits. Although the Israeli legal structure makes litigation of this sort possible, the judiciary has been little resorted to in the effort to "close the gap"—or, indeed, to hear almost any educational policy question. The impress of legalization on educational policy remains weak in Israel.

This fact is in some respects surprising. Although Israel, like Great Britain, lacks a written constitution, the Israeli Supreme Court, sitting as the High Court of Justice, has been willing to take a more expansive view of its authority than have the British Law Lords.[122] It has crafted decisions concerning basic rights out of whole judicial cloth, deriving norms from "fundamental principles on which our state was founded," as well as from more textual sources such as the Declaration of the State of Israel and assorted international covenants.[123] In this way, the High Court has protected individual rights and liberties in a manner "not too dissimilar from the constitutional adjudication in which American [and West Germany] courts are engaged."[124] Its decisions concerning the legality of West Bank settlements or refusals to grant parade permits, and of violations of claimed criminal rights all evince a willingness to act aggressively.

In education, however, the Israel Supreme Court has been far more reticent.[125] During the 1960s the Justices expressed sympathy with parents of European Jewish origin who bent the school attendance rules to seek what the court termed the "best education for their children." These parents were in effect retarding integration, but that was of no concern to judges who had little vision of the collective ends of education and little sympathy for the claim that such parents were "fleeing" their social responsibilities. With the Knesset's general authorization of integration, however, the Court reversed field. In the leading educational case, *Kremer v. Municipality of Jerusalem*,[126] Jerusalem parents sought to remove their child from a mixed junior high school and send him to an elite school run by the Hebrew University, over the objection of local officials. The

122. On the Israeli judiciary and individual rights, see Zemach, *Political Questions in the Courts* (1976); Friedmann, "Independent Development of Israeli Law," 10 *Israel L. Rev.* 515 (1975); Shapira, "The Status of Fundamental Individual Rights in the Absence of a Written Constitution," 9 *Israel L. Rev.* 497 (1974).

123. Shapira, supra n. 122.

124. Goldstein, "Judicial Intervention in Educational Decision-Making," in Goldstein, (ed.), *Law and Equality in Education* 95-96 (1980).

125. These cases are discussed in Goldstein, id.; Zemach, supra n. 64; Shapira, "Educational Liberty and Equality: Some Israeli Constitutional Law Perspectives," in Goldstein, supra n. 124 at 149-156.

126. 25(I) P.D. 767.

court sided with the officials, expressly subordinating individual rights to "the needs of the educational reform" to further the legislatively-voiced national interest.

The *Kremer* court acknowledged, if ambiguously, the existence of a parental right, but upheld the right of the educational authorities to override that choice. While in most cases such a right could be infringed only by an express act of the legislature, the integration plan proposed by the Government had been approved by a resolution of the Knesset, which was held to be sufficient to take the matter out of the hands of the court.

This result was not dictated by the law. It would have been possible for the court to find that the integration plan required a legislative enactment, and not a mere executive decision and subsequent resolution of approval, to override the acknowledged parental right. When property rights or economic interests are at stake, the high court has been much more rigorous in demanding that the Knesset's authorization be unequivocal. In fact, commentators' descriptions of *Kremer* vary slightly in their account of the doctrinal justification for the decision. Goldstein and Shapira both see the court's decision as an invocation of parliamentary supremacy: the Knesset resolution of approval for the Government plan was a sufficient exercise of legislative authority to take the case out of the hands of the court.[127] Zemach, however, reads the case as a political question, or justiciability, decision: educational policy reform is (quoting from the opinion) "by its nature . . . a public and political decision," best left to the political process.[128]

Bureaucratic action, not court opinion, has furthered the limited legalization that exists in the Israeli schools. Student discipline is now formally regulated by a code of conduct[129] that resembles the U.S. Supreme Court decision in *Goss* v. *Lopez*:[130] even short-term suspensions must be preceded by an attempt at conciliation and, if that fails, some form of hearing. Disputes over the proper placement of handicapped children are not decided within the school but are heard by appeals committees which loosely resemble those established under the English law. A representative of the local authority, a psychologist, and a member of the Israeli national

127. Goldstein, supra n. 124; Shapira, supra n. 125. This interpretation highlights the similarity between *Kremer* and the invocation of the doctrine of legislative reserve by the West German Federal Constitutional Court in education cases. See supra n. 101-103 and accompanying text.

128. Zemach, supra n. 122.

129. These rules are discussed in Goldstein, *The Rights of the Child in Israel* (mimeo, 1981). The rules are both substantive and procedural: they define the kinds of behavior which may be sanctioned and the procedures which govern the imposition of sanctions in great detail.

130. 419 U.S. 565 (1975).

inspectorate hear these cases, reaching decisions on the basis of the record generated in the dispute.

That the education ministry has introduced elements of legalization into the schools is suggestive of its authority. It is the national ministry that makes basic policy decisions. And, whether these concern the shape of school integration, the content of the curriculum, the disposition of student requests to distribute a political flier in the schools, or the resolution of parental demands to use the quarter of the school day set aside by law for locally-determined priorities, the preferences of a bureaucracy oriented to compromise, resistant to the airing of conflict in public, usually carry the day.[131]

3. Legislation in Perspective: The Israeli Bureaucracy

The bureaucracy, installed to separate educational decision-making from factional politics, remains the dominant force in Israeli education. The influence of the Knesset is limited because as in the realm of education the Knesset has only acted to legitimate the government's decisions of the government in power, not to make educational policy. Members of the parliament have had little interest in education. The high prestige traditionally accorded to education has muted criticism of educational policies, focusing such legislative energies as have been mustered on securing additional resourse. Local government enjoys few independent policy-making prerogatives in education. By and large, it functions as lobbyist, seeking particular favors from the central ministry. Teachers, whose political activities were restricted during the early statehood years to discourage divisiveness, have confined their collective energies to improving their economic situation. The teachers' organizations do not attempt to influence educational policy, as long as policy decisions do not adversely affect working conditions. Student groups are almost unheard of. And parents remain inclined to defer to the authority of teachers and principals; if parents need help, they use political or bureaucratic channels. Briefly put, education rights are not part of the Israeli mind-set.

The Israeli bureaucracy only slightly resembles the rational model. It promulgates rules, to be sure—even specifying the kinds of paper and pens to be used by schoolchildren—but the rules matter less than the bargains that it strikes. Compromise is the watchword of the organization. The national ministry negotiates with particular local authorities over issues of focused concern; it takes up the claims of parents' groups on an *ad hoc* basis. Conflict is rarely allowed to get out of hand, the ministry preferring inconsis-

131. See Elboim-Dror, *Israeli Schooling*, supra n. 15 and Peled, supra n. 115.

tent decisions that have no value as precedent to confrontations over matters of principle.

In such a generally fluid and responsive bureaucratic environment, there is little reason to go to the courts. Moreover, the Israeli judiciary is perceived as slow and costly, with little capacity to implement its decisions. Those disaffected with the prevailing norms, who would otherwise find themselves in court, are better served by mustering their clout within the bureaucratic setting. Recourse to the judiciary has been at most a threat—voiced, for example, during the 1960s, by the Oriental Jewish community in Jerusalem that sought integration—and not a likely strategy. Only where no possibility for compromise exists has the judiciary been called upon to act. A malleable bureaucracy, less interested in principles than in stays against confusion, willing to sacrifice efficiency for harmony, thus retains its hegemony over policy-making.

Certainly, not all bureaucratic decisions in educational matters are sacrosanct; the Israeli Supreme Court justices have overturned administrative decisions in a number of school cases. In one suit, the Court struck down the integration of an elementary school because the national Ministry of Education had failed to adopt a regulation authorizing the action.[132] In another, the Ministry was barred from instituting a coeducational high school in a community which preferred single-sex instruction; the statute gave local authorities the power to assign students, the court held. These opinions, like much of the West German and English case law, reveal a judiciary more inclined to decide which branch or level of government may act than to issue substantive edicts.

THE PATTERN: VARIATIONS IN LEGALIZATION

In a pathbreaking article, Abram Chayes chronicled the emergence of a form of litigation in America—public law litigation—in which courts are asked to confront "grievances over the administration of some public or quasi-public program and to vindicate the public policies embodied in the governing statutes or constitutional provisions."[133] The operation of the American schools has been the focus of much of this new public law litigation. Parents and students have successfully persuaded courts to hold educational administrators and policy-makers accountable to constitutional and

132. Shaul v. The City of Jerusalem, 29(2) P.D. 804 (1975). The case is discussed in Goldstein, supra n. 124 at 116-117.

133. Chayes, "Foreword: Public Law Litigation and the Burger Court," 96 *Harv. L. Rev.* 4 (1982). See also Chayes, "The Role of the Judge in Public Law Litigation," 89 *Harv. L. Rev.* 1281 (1976).

statutory norms of procedural fairness, parental choice, and perhaps most important, equal protection.

The story of the resulting legalization of American education may in ways be read as the story of a transformation in how schools are viewed. The transformation begins with cases like *Pierce* and *Meyer*, cases that recognize the potential of compulsory education to intrude upon rights of parents and children deserving of constitutional protection, and that consequently begin to bound the state's power.[134] The erosion of the view that schooling is a benefit to be offered on the state's own terms continued as courts rejected a regime of authoritarianism, finding in the constitution a mandate for pluralistic democratic management.[135]

Suits over parental choice or student liberties did bring judges into a more active role in the formation of educational policy, but they lack the essential characteristics of public law litigation. The rights they protect are individual rights, claims to negative liberty. They seek to prevent governmental interference, not to promote governmental action. The true transformation of the judicial role in American education has come in the recognition by courts of claims to equal treatment and due process: claims which assert positive rights affecting broad classes of parents and students and which require for their implementation fundamental changes in the structure and operation of educational institutions. Through this kind of litigation, courts have legitimated claims of access to the benefits of schooling and have imposed upon the schools legalistic requirements of administrative regularity. Lawsuits advancing these kinds of claims are paradigms of public law litigation and the recognition of this new class of rights through court decisions and through federal and state legislation has resulted in expansive judicial intervention in educational policy-making.

The story in Germany, Israel, and England is similar, but only to a point. In each of these countries, there is a growing recognition that schooling decisions affect interests of parents and children that are of sufficient moment to deserve legal protection. The language of rights has been introduced into the schools to protect those interests, and in each country parents and children have gone to court to enforce those rights.

Moreover, in each country there is a growing recognition of the role education plays in advancing the security and the welfare of both the individual and the state itself. As education has been

134. Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923), are discussed at supra n. 9 and accompanying text.

135. See, e.g., Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503 (1969); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

brought within the package of social and civil rights the welfare state seeks to secure, attacks have been made on the conditions of its provision. Thus, the demand for equal access to educational opportunity—the struggle for integration in the United States and in Israel, the movement toward comprehensive schools in Britain and in Germany—is a demand that the entitlement to education be made less conditional, more universal, by removing class or racial barriers to access. At the same time, it has given rise to demands that the provision of education be rationalized, that the bureaucratic and legal norms of procedural fairness which govern the distribution of other welfare benefits be broadened to include education. Thus, in each country the terms on which education is provided are increasingly defined by rules.

What is missing in Germany, Israel and Britain is a landmark equality-defining case, a *Brown v. Board of Education*.[136] Despite the existence in each country of an educational system that in fact has denied equal access to defined segments of the population, and despite some societal opposition to those systems, no litigation has emerged. No one has gone to court to seek integration in Israel or comprehensive schooling in Germany or Britain. The idea of a positive right, a demand for educational equality, has not been advanced in the courts; with the limited exception of the German *numerus clausus* litigation, demands for equality have been pressed largely outside the legal system. In the United States, by contrast, the courts have played a crucial role in broadening educational entitlements through expansive interpretations of the Equal Protection Clause.

Where litigation has arisen over the broadening of educational entitlements in Germany, Britain and Israel, the thrust of that litigation has been conservative. Parents have gone to court asserting that egalitarian changes in the structure of the schools deprive them of a liberty interest, the interest in controlling the upbringing of their children. This litigation is in someways reminiscent of the cases that, during the *Lochner*[137] era, accompanied the first forays of the American federal government into social and economic regulation.

The doctrinal responses of the German, British and Israeli courts to these challenges, however, reveal cultural variabilities more pervasive than a mere difference in stage of development. A suit asserting that a school assignment infringed upon a constitutionally protected parental right would involve an American court in a balancing process: the court would have to determine whether the

136. 347 U.S. 483 (1954).
137. Lochner v. New York, 198 U.S. 45 (1905).

asserted interest was constitutionally protected, ascertain the legitimacy of the state's goal in restricting that interest, and then weigh the two.[138] The German, Israeli and British courts have parted company with the American courts after the first step. In challenges to comprehensive school reforms or to integration, these courts, after determining whether an enforceable parental right exists, have then merely looked to see if the governmental action has been authorized by the legislature. The issue in these countries is addressed not as a question of constitutional limits on the scope of governmental action, but rather on constitutional limits as to the proper decider. It is who decides—not what is decided—that counts.

Legalization inheres not only in the application of substantive norms of liberty and equality to the schools, but also in the development of an adjudicative model of procedure. This second aspect of legalization is apparent in each of the four countries. In each, decisions about school assignments, suspensions and expulsions are increasingly governed by procedural norms. Educators and administrators are increasingly constrained to justify their decisions according to predetermined rules of general applicability: a regime of rules has been introduced. This kind of procedural regularity, however, differs little, if at all, from concepts of proper bureaucratic management. What is peculiarly "legal" about American developments along this line is the extent to which the safeguards imposed mirror adversarial, judicial proceedings.[139] Procedural reforms in Britain, Germany, and Israel lack that element of adversarialness. What's more, in the United States judicial-style proceedings have been relied upon not only to ensure fairness in disciplinary proceedings, but in fact to make decisions about the allocation of scarce resources.

TOWARD AN EXPLANATION: LEGAL AND POLITICAL INSTITUTIONS

A. Constitutionalism and Judicial Review

That the British and Israeli courts, in deciding challenges to school reforms, have focused their inquiry on whether the legislature mandated the reforms is not surprising. Courts in both countries are restrained by the doctrine of parliamentary supremacy; neither has a written constitution providing for judicial review of legislation. If Parliament or the Knesset has acted, the possibility of

138. For a description of the operation of balancing tests, see, generally Tribe, supra n. 4.

139. See, e.g., Kirp, "Proceduralism and Bureaucracy Due Process in the School Setting," 28 *Stan. L. Rev.* 841 (1976). Compare, Comment, "Due Process, Due Politics and Due Respect: Three Models of Legitimate School Governance," 94 *Harv. L. Rev.* 1106 (1981).

judicial intervention is foreclosed. Neither is it surprising that legalization is most advanced in the two countries with written constitutions providing for judicial review, the United States and West Germany. A written constitution promotes legalization by providing a source of norms that can be invoked to restrain governmental activity, and by placing judges in the position of enforcing those norms.

What seems anomalous is the operation of the doctrine of legislative reserve in Germany. The invocation of this doctrine by the Federal Constitutional Court in the comprehensive education cases reveals a judicial willingness to defer to the judgment of other actors in the political system when constitutional values are called into question.[140] The same inclination is apparent even in those cases which most exemplify the new judicial activism in Germany, the *numerus clausus* and sex education cases.[141] Indeed, the judicial elaboration of the equal protection clauses of the Basic Law generally betrays a preference for leaving hard decisions to the legislature.[142]

The operation of the West German system highlights the fundamental problem of judicial review: its incompatibility with the basic premise of majoritarian democracy. In political theory, all four countries share the ideal of a government accountable to law. Where they vary is in the answer to the question: "Who holds the government accountable?" Interestingly, constitutionalism does not appear to be an all-or-nothing phenomenon. Rather, the countries we have examined fall along a continuum of constitutionalism in their attempts to structure institutions that can accommodate the sometimes conflicting principles of accountability and majoritarianism.

Britain falls at one end of this constitutional continuum. In Britain, "[d]espite Dicey's praise of the rule of law, the . . . political system operates on principles of political, not legal, responsibility."[143] The British simply do not see courts as the institution charged with protecting the individual from governmental action.[144] This wholesale rejection of judicial review acknowledges that judicial review is fundamentally a political act.[145] By largely restricting the courts to the resolution of private disputes, the British system maintains their usefulness while generally keeping political power

140. See supra n. 102 and accompanying text.

141. See supra n. 104 and accompanying text.

142. See Klein, "The Principle of Equality and its Protection in the Federal Republic of Germany," in Koopmans (ed.), *Constitutional Protection of Equality* 69 (1975).

143. Morrison, supra n. 47.

144. Id.

145. Shapiro, supra n. 71 at 32.

out of the hands of judges.[146]

At the other end of the continuum lies the United States. What distinguishes the United States is not so much the idea of a rigid constitution immune from amendment through ordinary legislation, but rather the view that judges are the sole authoritative arbiters of the meaning of the Constitution and the ultimate enforcers of its guarantees. Whatever the outcome of the scholarly debate as to the justification for this blatantly anti-majoritarian institution, the American system "betoken[s] a cultural commitment to judicial oversight," in which the other actors in the system have largely acquiesced.[147]

West Germany lies between the United States and Britain on this continuum, but closer to the United States. Three structural characteristics distinguish the German Federal Constitutional Court and the U.S. Supreme Court. First, the German court is a centralized constitutional tribunal: it is the only court in the German system that can declare a statute invalid as violative of the Basic Law. Second, the Federal Constitutional Court can be called upon to decide the validity of a law whose constitutionality is in doubt at the behest of the government or legislature; no "case or controversy" clause bars these advisory opinions. Third, this court is a court of original jurisdiction with regard to constitutional complaints, not an appellate court.

The effect of these differences is to place the Federal Constitutional Court in an extremely exposed political position, compared to the U.S. Court. Constitutional decisions are inherently controversial, but in a decentralized system of judicial review, many applications of constitutional principles never reach the Supreme Court, and this fact mutes criticism directed to the American justices. Even worse, the German court, because it is a court of original jurisdiction and because it lacks a "case or controversy" clause, is deprived of many of the discretionary devices the U.S. Supreme Court has used to step out of hotly contested, politically charged issues.[148] The passive judicial virtues are formally unknown in West Germany.[149]

The politically exposed position of the German Constitutional Court is not accidental. The decision to locate judicial review in a single, centralized institution reflected the fact that ". . . the

146. Id.

147. Chayes, "The Role of the Judge in Public Law Litigation," supra n. 133 at 1307. See generally Choper, *Judicial Review and the National Political Process* (1980).

148. See Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

149. Id.

Germans stressed a question which in the United States was relegated to secondary importance: Who shall be the guardians of the constitution?"[150] That those guardians would be functioning in a fundamentally political manner was acknowledged from the outset.[151] The answer, too, acknowledged the anti-democratic nature of judge-made law, and sought to reconcile judicial review and majoritarianism by sacrificing a degree of judicial independence. Judicial review was thus entrusted to a single court whose members are selected in a way which guarantees some political representation.[152] Operating in such an exposed political position, and perhaps under the lingering influence of the pre-constitutional doctrine of parliamentary supremacy,[153] the West German court has acknowledged the legitimacy of the constitutional judgment of other political actors, particularly the legislature, at least with regard to some issues.

Israel, like West Germany, falls between the extremes represented by the United States and Britain, but its structural affinities are with Britain. The Israeli Supreme Court, when sitting as the High Court of Justice, has assumed an important role in defining and safeguarding the basic rights of Israeli citizens despite the lack of a written constitution. The doctrine of "essential rights" has been relied on to define those interests of the citizen that cannot be abridged except by express Knesset action. The Israeli Court has thus gone beyond the British doctrine of *ultra vires* as a predicate for judicial intervention. While the British courts may revoke an official action because it exceeds the powers authorized by Parliament, they leave the business of defining rights to the legislature. The Israeli Court by contrast, spins its rights out of whole judicial cloth; interestingly, in this its actions are more venturesome than those of the American and German courts. But while the idea of constitutionalism has vitality, at least in the minds of the Israeli justices,[154] the authority of the High Court is ultimately subordinate to the Knesset under the doctrine of parliamentary supremacy.

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150. Caspar, "Guardians of the Constitution," 53 *S. Cal. L. Rev.* 773, 774 (1980).

151. Cappelletti, supra n. 11. Obviously, other factors as the lack of expertise of civil law judges with constitutional litigation and with the concept of precedent, also affected the decision.

152. Id. Thus, judges are nominated by political parties for twelve-year terms. On the relationship between judicial independence and judicial review, see Shapiro, supra n. 71.

153. Cappelletti, supra n. 11.

154. Israel might best be described as a country on the way to a constitution. Under the Harrari resolution, the Knesset is charged with writing the constitution in chapters, by periodically enacting entrenched Basic Laws. See Sager, "Israel's Dilatory Constitution," 24 *Am. J. Comp. L.* 88 (1976).

B. Administrative Law and Parliamentary Systems

1. Judicial Review of Administrative Acts

Nearly a century ago, the British legal scholar, A.V. Dicey, argued that the Rule of Law "means in the last resort the right of the judges to control the executive government."[155] Not all educational policy decisions are legislative; much of education consists of administration, and policy decisions are often made by administrators, not legislators. There is thus a great deal of potential for legalization in the judicial exercise of authority over the decisions of administrators. In the administrative law context, the doctrine of *ultra vires* and its constitutional counterparts, legislative reserve in Germany and the doctrine of essential rights in Israel, become judicial swords wielded to invalidate administrative actions unsupported by enacting legislation.

Attitudes toward judicial review of administrative actions in these four countries in many ways resemble attitudes toward judicial review generally. In England, the growth of central government in the early postwar years was accompanied by a judicial retreat from the field of administrative law.[156] In Israel, the High Court has intervened, but only by insisting that decisions affecting essential rights be based on express legislation. As for Germany, it is in the area of administrative law that the willingness of the Federal Constitutional Court to share responsibility for articulating constitutional values is clearest. Through the doctrine of legislative reserve, the German court avoids substantive review of agency decisions, focusing instead on assuring the accountability of administrators to the legislature.

There is really no equivalent in American law to the doctrine of legislative reserve. Doctrines like the constitutional prohibition against delegation of legislative powers or against standardless delegation are the formal counterpart, but an examination of the cases reveals that, since the New Deal, these doctrines have been essen-

155. Dicey, *The Law of the Constitution* 401 (2d ed. 1886).

156. See generally, Schwartz and Wade, supra n. 47; Jackson, supra n. 47. Some writers have relied on *Tameside* and a handful of similar cases to speculate on a resurgence of judicial activism in British administrative law. See, e.g., Note, *English Judicial Review*, supra n. 49. Although the *Tameside* case is conservative with regard to the substantive educational issue involved, by administrative law standards, it indeed interprets the court's power liberally. In the years following World War II, a considerable body of authority had developed to the effect that a standard such as that involved in *Tameside*, which allowed the secretary to overturn any LEA decision if he was "satisfied" that the LEA was acting unreasonably, must be interpeted as a subjective standard. Morrison, supra n. 47 at 115. *Tameside* is a landmark of British administrative law because it applied an objective standard to the Secretary's judgment: the Secretary's decision was overturned because the court felt that the claim that no reasonable LEA could have made the decision at issue was factually unsupportable.

tially without substance.[157] American administrative law has instead been characterized by ". . . highly permissive delegations, rigorous agency procedures for rule-making and adjudication, and intense judicial scrutiny of substance. . . ."[158] In American administrative law as in American constitutional law, the courts have scrutinized the decision itself and how it is made, not the authority of the decider.

The delegation doctrine did enjoy a brief heyday in American law during the early years of this century.[159] But to explain the current interest in issues of delegation in these other systems as merely a function of developmental stage would ignore important structural and historical differences between the United States and the other three countries. Until the late nineteenth century, in the United States the federal government lacked both the inclination to undertake broad-based programs of welfare or economic regulation, and the bureaucracy necessary to implement them. When federal agencies did come on the scene, the courts had to struggle for ways to control agencies that were both independent and regulatory in character.

Agency independence goes a long way toward explaining the reluctance of the American courts to rely on doctrines like legislative reserve to control bureaucratic action. In a parliamentary system, ministeries are not independent, but are ultimately responsible to the Government; and Government may lose its parliamentary mandate. "Control by the majority party over administration is exercised through the ministry, to whose political success the parliamentary majority is committed for better or worse."[160] Ministerial responsiveness may, of course, fail to secure accountability, and ministries come to dominate the formation of policy.[161] Against this threat, use of the doctrine of legislative reserve to restore political accountability makes sense.

Agency independence in the American sense breaks the potential chain of direct agency accountability that formally exists in a parliamentary system. "Agency isolation . . . reverberates in the ex-

157. Thus, Davis concludes that the nondelegation doctrine has failed in the federal courts and that "one cannot read . . . [the cases] . . . without realizing the emptiness of the insistence upon standards." Davis, 1 *Administrative Law Treatise* 152, 160 (1978).

158. Albert, "The Constitutional Supervision of Administrative Agencies in the FRG: Similarities and Contrasts with American Law," 53 *S. Cal. L. Rev.* 583, 588 (1980).

159. Occasionally, proposals to revive the doctrine are advanced. See, e.g., Sax, *Defending the Environment* (1971). See also Goldstein, "The Scope and Sources of School Board Authority," 117 *U. Pa. L. Rev.* 373 (1969).

160. Albert, supra n. 158.

161. See Schwartz & Wade, supra n. 47 at 13-14, asking the question, "Who controls whom?"

pansive and searching character of judicial review of agency action, perhaps best captured in the judicially imposed conception of a court-agency partnership in the enterprise of administration."[162] Without any real possibility of direct political accountability, constitutionally predicated judicial supervision of agency behavior offers an appealing alternative.

The legalization of education reflects this difference in political systems. In Germany, Israel, and Britain, education has been incorporated into the general scheme of administrative law, and thus made subject to the same controls as other administrative decisions. Thus, for example, the effect of the demise of the special authority relationship in Germany was to subject educational administrators to the operation of the doctrine of legislative reserve. In America, the same step—the recognition that students do not "shed their constitutional rights . . . at the schoolhouse gate"[163]—led instead to direct, constitutional review of the actions of administrators.[164]

2. Judicial Power in Parliamentary System

Discussions of increased judicial involvement generally have tended to focus on the institution of judicial review. To stress judicial review, exclusively, however, threatens to ignore an equally important institutional consideration: the effect of a parliamentary system of governance. As Oregon Supreme Court Justice, Hans Linde, has said in speaking of the evolution of administrative law in Germany and America, this difference in political system is a "crucial thread . . . which, once pulled, does not end until the entire fabric of the comparison is unravelled."[165] In a parliamentary system, a sharing of the role of constitutional guardian when executive acts are challenged is sensible, because direct political accountability is a more realistic possibility; it is also attractive, especially when the issues threaten to involve the courts in a fundamentally political debate.

C. Discretion and Rules

Formation of policy is really only half the story. Policy implementation affects the individual at least as profoundly. In America, demands for procedural fairness in the provision of education have resulted in the implementation of highly legalistic schemes—schemes that are legalistic not only in their insistence on discretion-limiting rules, but also in their reliance on adversarial proceedings

162. Albert, supra n. 158.
163. *Tinker*, supra n. 135 at 506.
164. See Goldstein, supra n. 159.
165. Linde, supra n. 102 at 603.

modelled on adjudication.[166] This emphasis on adjudication as the model of fairness is not peculiar to education, but, rather, characterizes American administrative proceedings generally.[167]

Explanations of the adversarial character of American administrative proceedings stress the origins of American administrative law. It has been suggested that the high value that American liberal ideology places on individualism and self-assertiveness gives adversarial proceedings a greater claim to legitimacy than other methods of dispute resolution.[168] The regulatory character of the early American agencies, which were for the most part rate-setting and licensing agencies, by its nature invoked these individualistic values, and called forth the adversarial model thought best to protect them.[169] Further, the main architects of administrative procedures in America were judges and lawyers, who drew on the model most familiar to them.[170] Finally, the American agencies were a new institution, in need of the imprimatur of legitimacy that the highly respected adversarial model could provide.[171]

In West Germany, Britain, and Israel, the history has been very different. Historically, the development of the bureaucracy was not dominated by the regulatory model; neither was the legitimacy of governmental intervention generally in doubt. Moreover, courts have not led the way in developing administrative procedures: in Germany and Israel, concepts of bureaucratic regularity accompanied the development of the bureaucracy itself; in Britain, while the development of administrative tribunals by the Franks Commission showed the influence of lawyers,[172] the procedures used in educational appeals were developed by educational professionals, with lawyers conspicuously absent from the planning process and law conspicuously absent from the result.[173] At any rate, while restraints on the actions of educators are increasing in these countries, accountability is apparently believed to be sufficiently secured by rules that do not insist on adversariness.

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166. See, e.g., Neal and Kirp, "The Allure of Legalization Reconsidered," *L. & Contemp. Prob.* (forthcoming, 1984).

167. See generally Schwartz & Wade, supra n. 47.

168. Kelman, *Regulating America, Regulating Sweden* 135 (1981).

169. Id. at 139-141.

170. Schwartz & Wade, supra n. 47.

171. Kelman, supra n. 168 at 139.

172. Schwartz & Wade, supra n. 47; Jackson, supra n. 47.

173. See Bull, supra n. 78 and accompanying text. Bull argues that in fact there is no movement against administrative discretion in Britain at all. Participation, not rules, is what the welfare movement seeks. Cf. Schwartz & Wade, supra n. 47, who agree that there is no such movement, but attribute that to the fact that there is no discretion to exercise.

D. Equal Protection and Public Law Litigation

The idea of formal equality, in the sense of a prohibition against certain forms of discrimination, has broad appeal. The West German Basic Law contains a general guarantee of equality before the law,[174] as well as specific prohibitions against discrimination on the basis of sex, race, and national origin.[175] The Israeli Declaration of Independence promises equal social and political treatment without regard to religion, sex or race, and, though the High Court's treatment of the concept of equality has been characterized as "sporadic,"[176] the Court has acknowledged the principle of equality as "part and parcel of the spirit of our entire constitutional regime."[177] In England, racial and sex discrimination have been attacked by statute[178] and by the European Convention on Human Rights,[179] which has normative force. There is even an argument to be made for the existence of a judicial doctrine of equal protection, for if a ministry's actions created unreasonable classifications, they might be successfully attacked as *ultra vires*, on the presumption that Parliament would not intend delegated powers to be exercised unreasonably.[180]

It is not, however, the invocation of the Equal Protection Clause to enforce equality in its negative sense—as a prohibition against arbitrary or invidious discrimination—that has made the American experience with equality unique. What has set the American experience apart has been the transformation of the Equal Protection Clause into a norm of positive equality with real redistributive potential. Moreover, educational issues have been at the fore of this transformation. Although a redistribution of educational opportunities is under way in West Germany, Britain and Israel, as attempts are made to dismantle educational systems that perpetuate past societal inequalities, only in the United States have the courts, in the

174. Basic Law, Art. 3(1).

175. Basic Law, Art. 3(3). See also Art. 3(2), guaranteeing men and women equal rights. The development of an equal protection doctrine in the West German courts closely resembles American doctrine. The basic guarantee of equality before the law demands that legislation meet a minimum rationality test. Legislation which creates a classification on the basis of one of the specific, enumerated characteristics (sex, race, etc.) is subject to a higher standard of review, similar to that used by American courts when legislation denies a fundamental right or creates a suspect classification. For a discussion of German equal protection law generally, see, Koopmans, supra n. 140 at 69-125; Klein, supra n. 142 at 180; Shapira, "Educational Liberty and Equality," in Goldstein (ed.), *Law and Equality in Education* 149, 153 (1980).

176. Shapiro, supra n. 71.

177. Id. at 154, quoting Bergman v. Minister of Finance, 23 (I) Piskei Dei 693, 698 (Landau, J.).

178. Race Relations Act 1976, Sex Discrimination Act 1975.

179. Art. 14. Britain is also party to the Covenant Against Discrimination in Education (UNESCO, 1960).

180. Koopmans, supra n. 142 at 234.

name of equality, led the way in expanding entitlements to education.

The success of the American civil rights movement in the federal courts generally, as well as with regard to education, has largely been attributed to the fact that the movement failed in the other branches and levels of government. The idea that the inability of other political actors to respond encourages judicial activity receives support from the closest equivalent to *Brown*, the *numerus clausus* cases. In those cases, the underlying issue—overwhelming demand for admission to the universities—had reached a crisis level. Yet, the resolution of the issue demanded a high degree of coordination among the several states, each jealous of the status of its universities and each protective of the needs of its residents. Faced with a political stalemate, the Federal Constitutional Court was impelled to act. "The power exercised by the courts was a result of a vacuum in authority caused by passionate political strife about educational policy."[181]

With regard to the kind of issues which seem most suited to equality litigation—comprehensive schooling in Britain and West Germany, integration in Israel—other political participants have at least tried to participate. There is no vacuum of authority. That, however, cannot completely explain the lack of litigation over equality issues. The movement toward comprehensive schools in England was at times sporadic, suffering reversals during several changes in government before it made substantial progress. In Israel, even with the educational bureauracy's best efforts, integration is far from complete. And in West Germany, where the structural potential for constitutional litigation is greatest, the comprehensive movement has faltered yet equality has not become the subject of litigation.

The explanation may lie in the absence in West Germany, Britain and Israel of organizations like the NAACP, organizations formed to assert claims on behalf of specific interest groups, with litigation a major weapon in their arsenal. A number of developments facilitated the formation of this kind of legal action group in the United States. The existence of the NAACP as a model was certainly one factor. Another was the establishment of legal aid societies. The creation of poverty law offices did more than merely provide the poor with representation; it brought onto the scene lawyers whose mission was to serve the poor as a class, to identify their needs and to seek actively to fill them by acting as their representa-

181. Merritt, supra n. 9 at 32.

tives in the policy formation process.[182]

But perhaps most important, the 1960s also saw the development of the modern class action. The class action furthered the cause of public law litigation in a number of ways. First, the kind of rights asserted in positive equality cases tend to be group rights: the stakes for any individual plaintiff are relatively small and the true benefits of the litigation are diffused among all members of the group affected. The class action, by aggregating the claims of individuals allows prosecution of claims which would otherwise not have been brought. Second, because attorney fees are recoverable from the class's recovery, class actions created an incentive for attorneys not only to litigate these claims but to seek them out. Finally, class actions increase the capacity of courts to adjudicate public law disputes, and the legitimacy of them doing so, by bringing into court all of the parties affected, and by giving the court an active role in assuring that all interests are adequately represented. As Chayes has pointed out, these developments mark a step beyond the nineteenth century model of adjudication as private dispute resolution.[183]

In Germany, Britain, and Israel, however, the model of litigation has remained essentially private and individualistic. Even when these countries have responded to the kinds of needs asserted in the United States in the 1960s, they have attempted to fit those needs into the model of private law. Thus, where steps have been taken to address the need of the poor for legal services, responses have focused on reimbursing private attorneys for their representation, not on creating offices dedicated to serving the needs of poor clients as a group. What judicial recognition there has been of the need for special procedural devices to advance the diffuse, group-oriented rights of the welfare state has been in the form of expanded standing for individuals, creation of attorneys general, or recognition of test cases. The class action is virtually non-existent.[184] Without the poverty law office, without the class action, without a public interest bar generally, it is not surprising that claims based on public rights are seldom pressed through the courts.

That the private law model of adjudication remains dominant is demonstrated even in the *numerus clausus* cases. One of the distinguishing characteristics of the public law model is the breadth of the

182. See Handler, "Public Interest Law Firms in the United States," in Cappelletti and Garth, *Access to Justice*, Vol. III, 421, 424-425 (1979).

183. Chayes, "The Role of the Judge in Public Law Litigation," supra n. 133 at 1281, 1284.

184. These observations are drawn mainly from the study undertaken by the Florence Access-to-Justice Project, reported in Cappelletti and Garth, supra n. 182.

remedial decrees which have been developed to vindicate this new class of group-oriented rights. In the *numerus clausus* cases, however, the court, though acknowledging that all holders of the *Abitur* had a constitutional right to higher education, merely ordered that the universities be filled to their capacity: no order to expand the schools themselves was forthcoming.[185]

That decision was left to the *Land* legislatures, with a warning that eventually the court might find fault with any system of quotas and waiting lists that effectively denied the right to an education. When faced with a claim by an individual student who could demonstrate that there was a space available, the courts, while recognizing that any number of claimants might have an equal claim to that spot, have kept the litigation firmly in the private model by awarding the seat to the plaintiff in the lawsuit, on a theory that initiative in bringing suit should be rewarded.[186]

Ironically, the compromise reached in the *numerus clausus* cases has plunged the German courts into involvement with aspects of the operation of the universities—for example, in reviewing the number of prerequisites in a course of study to see if by eliminating them, spaces could be opened—which even the U.S. Supreme Court has found unsuitable for judicial intervention. This kind of academic, professional decision would be, in the Supreme Court's opinion, beyond the pale of judicial review. The German courts have nonetheless forged ahead, perhaps because the alternative—a remedial decree which would address the rights of university-bound students as a class—was even less appealing.

Thus, although the German Constitutional Court's expansion of educational entitlements is the closest equivalent to the American experience, the Court stopped far short of the kind of relief an American court might have ordered. Consistent with the Federal Constitutional Court's preference for impelling actions by other governmental actors rather than acting itself, it left affirmative action to the legislature.[187]

Perhaps the resistance shown by the West German Court, and by Israeli and British courts, to litigation in the public law model simply reflects discomfort with the political role it entails for the judge. As we have seen, judges in these systems operate in a more

185. By contrast, American courts have on occasion ordered the levying of taxes to vindicate the right, although their authority to do so has been sharply debated. See, e.g., Frug, "The Judicial Power of the Purse," 126 *U. Pa. L. Rev.* 715 (1978).

186. See supra n. 9 and accompanying text.

187. The court has taken the same approach in other equal protection cases. Thus, where a claimant has established that a benefit scheme has discriminated unlawfully, rather than award the plaintiff benefits, the court has declared the scheme unconstitutional, maintained jurisdiction over the case, and awaited legislative action. See Klein, supra n. 142.

exposed, and thus more precarious, position than their American counterparts. The resistance may also reflect a recognition that class actions (and public law litigation generally) "short-circuit" the political process, allowing groups to win through litigation what could not be won in the political arena and promoting the formation of single-issue, temporary organizations outside of the normal channels of political bargaining.[188] Public law litigation poses a threat to the underlying assumption that the best protector of personal liberty is political accountability.[189]

TOWARD AN EXPLANATION: THE SCHOOLS THEMSELVES

So far, our search for explanations has focused on legal and political institutions. Such institutional determinants cut broadly across all areas of policy. Any explanation of legalization with respect to particular institutions—like schools—must perforce take into account the forces at work within those particular settings.[190] What we have seen, in looking at the pattern of legalization in the four countries, is that legalization may be profoundly affected by the nature of the issues that dominate the policy agenda. In turn, the way those issues are framed varies importantly according to normative judgments about the nature of schooling and its role in society at large.

With regard to one set of issues—student rights within the schools—some convergence on a model of schools is apparent. With the exception of Britain, where the primary model of school governance remains largely authoritarian and hierarchical, paternalistic conceptions of the relationship between educator and student have given way, and limits on the authority of administrators and educators with regard to suspensions and expulsions have emerged. With this change has come the language of rights, and legalization.

Parents' interests have shared in this transformation, also taking on the status of rights. The legitimacy of the parental interest in shaping the child's future has been acknowledged by judicial decisions in West Germany and Israel, and by the British Parliament.

188. Garth, "Introduction: Toward a Sociology of the Class Action," 57 *Ind. L.J.* 371, 377-379 (1982). See also Mather, "Conclusion: The Mobilizing Potential of Class Actions," 57 *Ind. L.J.* 451 (1982).

189. Similarly, Cappelletti has attributed the resistance to the forms of public law litigation to a "post-revolutionary suspicion" of intermediate organizations. Cappelletti, supra n. 182. Indeed, an early study of political culture showed some empirical substantiation. People in the United States were much more likely to consider enlisting the aid of others in an informal group to influence local and national government than were people in Germany or Britain. Almond and Verba, *The Civic Culture* 191 (1965).

190. See Weiler, supra n. 89, arguing that legalization is a function of both judicial structure and the nature of the issues dominating the policy debate.

Yet the contours of this parental right vary, in part because the right has evolved in the context of different policy controversies.

In the United States, the parental right emerged out of controversies over, first, state regulation of private schools, and, later, controversies over school prayer, flag salutes, etc. The issues, as the courts have seen them, have involved the limits on state power to use the schools to socialize its young citizens. Framed in this way, the disputes invoked the historic American commitment to pluralism in matters of religion and belief. Out of these cases came a model of schooling that treats schools as a microcosm of society at large, and that expects the schools to aspire to constitutional norms of fairness and respect for individual values and beliefs.

Thus, when parental and student claims to liberty are asserted as rights to be free from the socializing effects of schooling, the credence given to the claim may vary according to the perceived legitimacy of the state's interest in using the schools to shape character—in other words, according to the value attached to pluralism. These kinds of liberty-based claims have met the warmest reception in the United States, with its historical commitment to pluralism, and in Germany, where pluralism has acquired a high value in response to the attempts of the Nazis to use the educational system to forge the *Reich*. Pluralism has the least appeal in Israel, where the specific mandate of the schools is to bring unity out of cultural multiplicity.

England presents an odd case in this respect. While pluralism does not have the normative value it has in the United States and Germany, neither are the schools seen as crucial in building a national character, as in Israel. Certainly, the class-based divisions of the noncomprehensive schools were justified as appropriately socializing.[191] Rights, however, are creatures of Parliament, and a look at the limits of the parental right established in the 1980 Act is revealing: the local authority has a duty to respect parental choice "unless compliance would prejudice the provision of efficient education or the efficient use of resources.[192] The counterweight to the parental right is not so much the state's interest in socialization as the professional's and the administrator's interest in efficiency.

For the most part, however, the issue which has given rise to claims of parental right in West Germany, England, and Israel has been school reform—comprehensivization or integration. In this domain, parental claims of liberty have been almost uniformly unsuccessful. Limited victories forcing legislative action have occasionally been won, but in the long run egalitarian reforms have withstood ju-

191. See supra n. 47 and accompanying text.
192. 1980 Education Act, § 7. See supra n. 77 and accompanying text.

dicial tests. In part, this may simply reflect a consensus that equality is an appropriate goal for government to pursue.[193] In a way, parental demands for liberty in the face of these kinds of reform really raise a different kind of claim. The claim has little to do with a demand that the state respect religious or political beliefs of the parent or child. Rather, the essence of the right asserted is a claim to continue to benefit from an admittedly inegalitarian system.

Equality-based reforms, particularly in West Germany and Britain, are matters of party politics, not personal belief. Comprehensive schooling entailed dismantling an apparently meritocratic but in fact class-tracked system; for that reason, questions about comprehensivization have been politically charged, with positions dividing along party lines. Decisions having to do with comprehensive schooling are regarded as having normative connotations for the structure of society itself.[194] The court's gingerly treatment of such an issue illustrates again the reluctance of the judges to do more than assure that when overtly political issues are presented, decisions are made by a politically legitimate decider.

When liberty claims are raised in opposition to equality-based reforms, the result is, in a way, to convert liberty claims into access claims. Thus, the thrust of a British parent's claim to have his preference regarding his child's education respected is really to gain access to a "better" school for the child in the face of reforms which seek to equalize the quality of schooling. The way access claims of this sort have been handled in the four countries we have looked at sheds new light on the uses of law in each system.

Clearly, the system set up to handle the access claims of the handicapped child in the United States is the most pervasively legal.[195] What makes this system "legalized" is not particularly its subjection of educational decisions to substantive or procedural constitutional norms, nor, particularly, the availability of judicial review. Rather, it is legalized in its reliance on legal reasoning and the language of rights to secure fairness. The system defines the handicapped child's claim as a right. The right itself is defined in terms of a general principle: each child has a right to an appropriate education, measured by the needs of that child. Further definition of the right turns on application of the general principle of "appropriateness" to the facts of individual cases, in a forum which procedurally resembles a court, and with provisions for appeal and judicial re-

193. Thus, Goldstein, supra n. 124, points out that *Pierce* and *Meyer*, supra n. 19 might be decided differently were they decided today.

194. See supra n. 94 and accompanying text. Interestingly, curriculum disputes take on a similarly political character. See Beattie, "Public Participation in Curriculum Change: A West German Example," 7 *Compare* 17 (1977).

195. Education for All Handicapped Children Act, 20 U.S.C. § 1400 et seq. (1975).

view. In operation, such a system normally will, and in this case has, effectively developed a rule of precedent: school administrators keep track of the disposition of individual cases, and modify their provision of services accordingly.[196]

By comparison, the British appeals board system is, in this sense at least, strikingly non-legal.[197] To be sure, it incorporates some of the forms of law, though it bears but a superficial resemblance to a court and lacks the reliance on "legalistic" means of characterizing and balancing parental claims. The basic premise of the system is not that the needs of the individual child should be determined in accordance with a principle of general applicability, but rather that arbitrariness should be checked by rules and fairness assured by a right of appeal. A parent's only claim is that the rules be correctly applied. Ultimately, the British system reinforces the control of the local education authority in maintaining the efficient operation of the schools.

The German handling of the *numerus clausus* cases[198] comes closer to an American reliance on legalism, defining as it does the student's claim as a right, and allowing a case-by-case judicial determination of the capacity of the university to admit just one more student. But it is clear that this is viewed as a stop-gap measure. The thrust of the judicial decisions is to prod the legislature into mandating a system of specific rules to govern these access claims. A detailed system of rules, bureaucratic in character if legislatively designed, is the ultimate goal.

There is a difference between the claim of a handicapped child to an appropriate education and the claim of a university student for admission to a particular university or the claim of a parent for a child's admission to a grammar school. Even in the United States not all claims are governed by the forms of law and the language of rights. Yet the same point—that legalization in America betrays not only a reliance on the norms and forms of law, but also a preference for the language of rights and the reasoning process that language entails—could be equally demonstrated by looking at other issues. What seems to set the United States apart is a presumption that fairness is best secured, that the individual is best protected from the power of the state when decisions are made on a case-by-case basis by applying general principles to the circumstances of the individual, subject to the norms of the Constitution.

196. Hill and Maday, *Educational Policy-Making Through the Civil Justice System* 20-21 (Rand Corporation, 1982).

197. See supra n. 78 and accompanying text.

198. See supra n. 9 and accompanying text.

CONCLUSION: THE USES OF LAW

A tenet of comparativism warns that comparisons of isolated aspects of countries' legal systems may mislead; no element of a system of governance operates in isolation.[199] On the surface, the experience with legalization of educational policy disputes in these four countries seems to substantiate the characterization of legalization as "the modern trend of governance." Each country partakes of what seems to be an international trend toward defining the interests involved in educational policy disputes in terms of rights and duties, a trend toward the use of the language of the law. Each has introduced the forms of law into the schools, establishing procedures which share some of the characteristics of adjudication to govern resolution of disputes over choice of school or student discipline. And in each, courts have become involved in educational policy disputes in order to hold educators and administrators accountable for their decisions.

Yet beneath the surface, the variations in each country are of more interest than the similarities. Taking the American experience as the standard for legalization, a number of differences stand out. For one, the use of the courts to raise claims of positive liberty, to secure rights, and to achieve direct input into the formation of policy, is limited outside the United States by the absence of the social and structural prerequisites of litigation in the public law model. Instances of groups using the courts to secure new entitlements are rare, the *numerus clausus* and sex education cases in West Germany being best characterized as the exceptions that prove the rule.

For another, even where quasi-judicial procedures have been introduced into the schools—as with the appeals boards in Britain or with student discipline in Israel—an element of legalization has been absent. The American experience, especially with regard to the scheme set up to adjudicate claims of the handicapped, has incorporated not only the forms of law, but also the model of legal decision-making, the idea of reasoning from general principles to reach results in concrete cases. The focus of procedural safeguards in Britain, Germany, and Israel, to characterize broadly at the risk of overgeneralization, has been to inveigh against arbitrariness, to check bureaucratic discretion by insuring regularity in the application of detailed, specific rules. The British, German, and Israeli procedures establish regime of bureaucratic regularity, not of legal process. By contrast, it is not just law that has "pride of place" in

199. The point is usually made with references to the impracticability of transplanting particular legal structures from country to country. See, e.g., Cappelletti and Garth, supra n. 182 at 122.

American society, but the legal method itself which dominates as the individual's refuge from the powers of the state.

Finally, the courts in each of these countries have become involved in assuring that policy-makers are in some way held accountable for their decisions. In West Germany, Israel, and Britain, however, the emphasis has been more on who made the decision than on what the decision was.[200] Further, in each system, the courts seem to have slightly different opinions of who the right decision-maker is.

Thus, in Germany the courts have emphasized the need for direct, legislative supervision of important policy choices, shifting authority from the bureaucracy to representative bodies to secure accountability. In Israel, the courts though nominally insisting on legislative supervision, have left authority largely in the hands of the central bureaucracy. Arguments for reform have focused on making the bureaucracy itself more representative, and thus more accountable.[201] In Britain, the main result of litigation has been to insulate the authority of local professionals against all but direct Parliamentary intervention. When accountability has been sought, it has been through more direct participation of the parties affected in the process of policy formation at the local level.[202]

The tendency in the United States has been to insure accountability by holding policy-makers directly responsible to constitutional and statutory norms, not by looking at the authority of the decision-maker. What really distinguishes the American experience, therefore, has been reliance on the judiciary as the primary interpreters of the meaning of constitutional and statutory provisions, and the accompanying transformation into legal issues of problems that are considered primarily political, professional, or administrative elsewhere. The effect of this direct supervision has been to place American courts in the position of reviewing substantive policy outcomes, to give them an active role in shaping the distribution of educational resources unparalleled elsewhere.

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200. Thus, predictions that these courts are gravitating toward an American model of judicial review may be misleading. While a trend toward some form of judicial review may be detectible, Israeli, British, and even German courts remain somewhat reluctant to review the substance of legislative and administrative acts. This reluctance is not merely prompted by inexperience. As Cappelletti, supra n. 11, has pointed out, judicial review can serve more than one function. While American courts have used judicial review to keep legislators true to the norms of the Constitution, German, Israeli, and British courts have been more concerned with using it to a different end, that of preserving the appropriate allocation of the power to decide.

201. See, e.g., Nachmias and Rosenbloom, *Bureaucratic Culture* 170-199 (1978).

202. See, e.g., Taylor Committee Report, *A New Partnership for our Schools* (1977).